Bliss Clearing Niagara, Inc. *and* International Association of Machinists and Aerospace Workers, AFL–CIO *and* William L. Moran. Cases 7–CA–46528, 7–CA–47566, and 7–CA–47070

February 28, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On November 5, 2004, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bliss Clearing Niagara, Inc., Hastings, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. February 28, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

A. Bradley Howell, Esq., for the General Counsel.
Robert W. Sikkel, Esq., of Holland, Michigan, for Bliss Clearing Niagara, Inc.
David Porter, of Cincinnati, Ohio, for the International Association of Machinists and Aerospace Workers, AFL—CIO.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on June 2, 3, 4, and July 26, 27, and 28, 2004. The initial charge was filed by the Union on August 18, 2003, and a complaint was issued October 21, 2003. William L. Moran filed a charge on January 21, 2004. On March 26, 2004, the Regional Director issued an order consolidating cases, amended consolidated complaint, and notice of hearing. During the interregnum in the trial proceedings, the Union filed an additional charge on June 8, 2004. On July 2, the Regional Director issued a complaint arising from this charge.[1]

The General Counsel alleges that the Company violated Section 8(a)(1) of the Act by informing employees that their union activities were under surveillance, coercively interrogating employees about their union sympathies and activities, and threatening closure of the plant if the employees chose union representation. It is also alleged that the Company violated Section 8(a)(1) and (3) of the Act by discharging two employees, Brian Shapley and Duane Schantz, because they provided assistance to the Union and engaged in concerted activities. Finally, the General Counsel contends that the Company violated Section 8(a)(1) and (4) of the Act by verbally harassing William L. Moran, issuing two written warnings and a 3-day suspension to Moran, and refusing to allow him to work a scheduled shift because he gave testimony and filed charges under the Act. The Company filed answers to the complaints, denying all of the material allegations.

As described in detail in the decision that follows, I conclude that a supervisor and agent of the Company did create an impression that the employees' union activities were under surveillance and threatened an employee with closure of the facility in the event the workforce chose union representation. Ad-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by verbally harassing employee William Moran, we rely on Supervisor Daniel Gilbert's statement to Moran that he did not want Moran "to get mixed up" in the "stuff going on with the union and the NLRB." This statement had a reasonable tendency to interfere with, restrain, or coerce Moran in the exercise of protected activity.

Member Schaumber agrees with his colleagues that this statement was coercive and constituted a violation of Sec. 8(a)(1). He would not, however, characterize it as "verbal harassment."

Member Schaumber also agrees with his colleagues that Supervisor Gilbert's conduct on June 30, 2003, constituted unlawful creation of the impression of surveillance. He therefore finds it unnecessary to pass on whether Gilbert's statement to employee Moran on May 28, 2003, standing alone, would also constitute an unlawful creation of the impression of surveillance. The finding of an additional violation would be cumulative and would not affect the remedy.

[1] In conjunction with the filing of the new complaint, counsel for the General Counsel filed a motion to consolidate cases. (GC Exh. 1(w).) The Company did not oppose this motion (Tr. 562—663) and I granted it, applying the analysis described in *Folsom Ready Mix*, 338 NLRB 1172 (2003) 1.

ditionally, that supervisor and agent coercively interrogated employees about their union sympathies and activities. I also find that the General Counsel has met his burden of showing that Shapely and Schantz engaged in union activities, that the Company was aware of their participation, and that their participation in such activities formed a substantial motivating factor in the Company's decision to terminate their employment. I further conclude that the Company failed to demonstrate that Shapely and Schantz would have been discharged regardless of their participation in union activities. As to the allegations involving Moran, I find that a Company supervisor and agent verbally harassed him due to his participation in proceedings before the Board. I also find that the General Counsel met his burden of establishing that Moran was denied the opportunity to work a previously scheduled shift due to his participation in these proceedings. The Company failed to establish that Moran would have been denied the opportunity to work this shift regardless of such participation. In addition, the General Counsel has met his burden of establishing that the Company was aware of Moran's involvement in the proceedings before the Board and that the issuance of two written warnings and a 3-day suspension to Moran were substantially motivated by this involvement. Lastly, I determine that the Company met its burden of demonstrating that it would have issued the two written warnings and the 3-day suspension to Moran regardless of his involvement in these proceedings.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is engaged in the remanufacture and replacement of parts for industrial presses at its facility in Hastings, Michigan, where it annually receives gross revenue in excess of $50,000 and purchases and receives products, goods, and materials valued in excess of $50,000 directly from firms located outside the State of Michigan. The Company admits[3] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. THE FACTUAL BACKGROUND

Bliss Clearing Niagara, Inc., is a Delaware corporation that commenced operation on May 11, 2001. The Company was created in the aftermath of the bankruptcy of a predecessor corporation. It is a wholly owned subsidiary of CIT Group, Inc., a commercial finance company that was one of the predecessor's creditors. Two of CIT's risk management executives are in charge of the Company's operations. Karen Adams, vice president of risk management for CIT, serves as vice president of the Company and liaison with the parent organization. She spends the majority of her time at the Company's sole facility in Hastings, Michigan. In turn, Adams reports to Ben Landriscina, who serves both as an executive vice president of CIT and as CEO of the Company. Landriscina provides oversight from his offices at CIT in New York.

The Company's rather unusual name stems from its formation out of the remnants of three venerable and now extinct producers of industrial presses. In other words, the current company provides after market parts, service, and rebuilding for large metal forming equipment that was manufactured by the former Bliss, Clearing, and Niagara companies. It employs approximately 40 production workers, many of them engaged in the operation of the machines required to accomplish the Company's business.

There was general agreement that a significant focus of attention by management was on the issue of production errors. These manufacturing errors could result from a variety of causes, including operator mistakes, problems with the machines, errors in methodology, or defects in materials. The Company maintained a quality control department charged with documenting, analyzing, and minimizing such errors. Errors were documented through the use of computer generated discrepancy reports.

One of the efforts to reduce errors was directed at the issue of operator mistakes. At first, management created an incentive program to provide small financial awards to those machine operators with the best records. Early in 2003, a different approach to the problem was initiated. Frederic Stowell, the CEO at that time, testified that,

> [w]e had a program for rewarding employees for having few errors or no errors and it was successful with some employees, but, unfortunately, not successful with several employees and we decided about that time we needed to take a different approach to getting the quality to an acceptable level and began some disciplinary actions with the employees who were not able to meet the quality requirements.

(Tr. 447–448.) Implementation of the new policy began with a comparative examination of each machinist's discrepancy reports covering the period from September 2002 through March 31, 2003.

After review of the history of operator errors reflected in these reports, management selected the four employees deemed to have the poorest records and decided to issue each of them a 3-day suspension. In order to avoid penalizing customers who were waiting for orders by causing delay resulting from the loss of the services of four employees at the same time, it was decided to stagger the suspensions over the following weeks.

On April 1, the first suspension was issued to Mike Shapley, a machinist who had been employed by the Company and its predecessors since 1995. Stephen Wales, the Company's manufacturing manager, imposed Shapley's discipline. It was documented in an employee warning notice prepared by Wales indicating that Shapley had the highest error rate during the

[2] In an addendum to this decision, I have corrected certain material errors in the transcription.

[3] See, the Company's answer to the consolidated complaint. (GC Exh. 1(p), pars. 3, 4, and 6.)

period under examination.[4] In the notice, Wales opined that Shapley was "capable of eliminating his operator errors but he is not applying himself." (GC Exh. 2, p. 1.) Wales also noted that Shapley's performance would be evaluated again on "5/1/03 or before." (GC Exh. 2, p. 1.) Shapley served his 3-day suspension without pay from April 2 through 4.

Ten days after the issuance of Shapley's suspension, identical discipline was imposed on another machinist, Mark Jensen. Wales also documented this action through use of an employee warning notice similar to that prepared for Shapley. (GC Exh. 13.) On May 6, Wales met with the remaining two employees selected for suspension due to excessive operator errors, Duane Schantz, a machinist who had been employed by the Company and its predecessors since 1997, and Vern Hayes. Each man was issued an employee warning notice. (GC Exhs. 3 and 17.) On Schantz' notice, Wales observed that, "Duane is capable of quality work. He needs to pay attention and apply himself."[5] (GC Exh. 3, p. 1.) Wales wrote that a further evaluation of Schantz' performance would be conducted on "6/6/03 (or before)." (GC Exh. 3, p. 1.) Schantz and Jensen served their suspensions from May 7 through 9.

It is evident that Shapley was unhappy with his suspension. Shortly thereafter, he filed an application with another employer. More pertinent to this case, during this period Shapley began discussing his interest in union representation with other employees.[6] One of them, Wayne McClelland, testified that during such a discussion, they decided that Shapley should "check on a couple of different unions." (Tr. 245.) A week later, Shapley told McClelland that he had contacted the UAW and was referred by their staff to the International Association of Machinists and Aerospace Workers.

On May 3, Shapley telephoned Stacey Arnold, business representative for District 97 of the Union. Although Arnold was not available, Shapley left a message indicating that he was "interested in having a union at Bliss." (Tr. 279.) Due to the press of other business and activities, Shapley and Arnold traded telephone messages until they finally spoke on May 27. After discussing the issue of union representation, Arnold outlined the organizing process for Shapley. She instructed him to obtain the names, addresses, and telephone numbers of employees "to see who's all interested." (Tr. 24.)

On the next day, May 28, Shapley began to solicit the information sought by Arnold. He collected names and contact information from employees in the parking lot before his shift, during the shift, and while on break.[7] Among those who provided the desired information was Schantz. Around noon, Shapley asked Schantz to obtain the address of another employee. Schantz spoke with that employee who reluctantly gave him the contact information. Schantz passed it along to Shapley at approximately 2:30 p.m.

The testimony reflects that during the noon hour management made its first response to the employees' organizing activity. A maintenance worker, William Lawrence Moran[8], testified that at approximately 12:30 p.m., a supervisor, Daniel Gilbert, approached him and said, "Larry, I've heard some people are trying to form a union and they're asking for names and addresses." (Tr. 111.) Moran responded by indicating that he was unaware of any organizing activity. Gilbert asserted that, "I hear one of them is Dewey." (Tr. 111.) This was a reference to Duane Schantz, who is universally known as Dewey. As Gilbert concluded the conversation, he asserted to Moran that, "well there's going to be some changes around here today." (Tr. 111.)

In his own testimony, Gilbert denied having this conversation or any other conversation with Moran on May 28 regarding union activity. I do not credit this denial. In the first instance, Gilbert's own testimony concerning his activities and opinions on May 28 lends credence to Moran's report. In both testimony and written accounts (GC Exhs. 52 and 54), Gilbert indicated that he had focused his attention on the activities of Shapley and Schantz on this key date. In itself, this is unusual since Gilbert did not ordinarily supervise these two employees. Gilbert went on to state that after noticing that these men were away from their work areas, he reported this fact to CEO Stowell. Indeed, he testified that he told Stowell, "these two individuals would not be missed if they were terminated." (Tr. 883.) Thus, Gilbert's description of his behavior on this date lends considerable support to Moran's assertion that he expressed interest in organizing activity, particularly that of Schantz, and that he threatened unspecified consequences. Moran's account of a lunchtime conversation with Gilbert about union activity is further supported by Wales' testimony.[9] Wales reported that shortly before lunch, Gilbert told him that, "he had been made privy to information that Dewey [Schantz] and Mike [Shapley] had been kind of trying to talk to people out in the shop about getting support to have a vote for a union." (Tr. 299.) Beyond this, as will be recounted throughout this decision, I have determined that Gilbert was a key management actor in a variety of unlawful acts directed at employees' organizing activities and involvement in Board proceedings. The statements reported by Moran are consistent with Gilbert's demonstrated attitude and pattern of conduct.

Wales testified that upon learning about organizing activity from Gilbert, he made immediate reports to his superiors. Specifically, he testified that he reported this information to Stowell and, separately, to Adams. Stowell told Wales that he

[4] Discrepancy reports attached to the disciplinary notice showed that Shapley had made errors costing $4,679.47 during the period examined. His last error occurred on March 18.

[5] Discrepancy reports attached to Schantz' notice showed errors costing $4,244.22 during the period examined. The last error occurred on March 18.

[6] Three employees, Wayne McClelland, Duane Schantz, and John Heatherington testified to having such conversations with Shapley during this time.

[7] A fellow employee, Greg Cole, corroborated Shapley's testimony regarding his organizing activities on this crucial date. Cole testified that Shapley approached him prior to the beginning of the shift. He asked Cole if he was "interested in forming a union . . . [a]nd . . . if I was to give him my name, address and phone number." (Tr. 225.) Cole provided this information to Shapley later in the workday.

[8] Moran goes by the name of "Larry."

[9] The issue of the credibility of Wales' testimony as to many issues is a central feature of this trial. For reasons I will outline in detail later in this decision, I have determined that Wales' accounts, including his report of Gilbert's comments on May 28, are credible.

would telephone Landriscina in New York and advise him. Thereafter, at approximately 2 p.m., Stowell phoned Wales and asked him to come to his office. Wales testified that upon arriving there, Stowell informed him that he had spoken to Landriscina about the organizing activity, and "that Ben [Landriscina] had told him that he wanted those individuals fired immediately." (Tr. 301.) While giving Wales the task of performing the discharges, Stowell counseled Wales to confine his explanations to the fact that, "we're an at will employer and they're being terminated." (Tr. 301.) Stowell also observed to Wales that, "Ben [Landriscina] was really adamant and he said he will not have a union in the shop at Bliss." (Tr. 302.)

Stowell and Adams disputed Wales' testimony that he was instructed to discharge Shapley and Schantz in retaliation for their organizing activity on May 28. It is obvious that assessment of Wales' credibility is central to the analysis of these and other allegations against the Company. In making this evaluation, I have been mindful that the Company terminated Wales' employment on September 10, 2003. Wales' status as a discharged former employee of the Company mandates careful scrutiny of his motives.

Three factors persuade me that Wales was a credible informant: his demeanor and presentation on the witness stand, the Company's failure to demonstrate any unusual circumstances involving his termination that would color and shape his testimony, and the existence of a significant body of circumstantial evidence that supports his account of the events under consideration. I will address each of these factors.

In his appearance and testimony at trial, under both direct and cross-examination, Wales did not display any hostility or vituperativeness. Nothing about his manner suggested a reckless desire to harm his former employer through fabricated testimony. Instead, his demeanor was consistent with that of an individual who recognized that he had engaged in wrongful and unlawful conduct that caused harm to others and who sought to atone for this behavior through participation in these proceedings. This was illustrated under cross-examination when he told counsel for the Company that, "I was instructed on the 28th to terminate two employees for an illegal reason and I felt terrible about that and I still carry that burden with me today." (Tr. 409.) Virtually everything about his manner and tone on the witness stand supported this description of his motivation.

The Company asserts that Wales was motivated to give false testimony because he desired revenge for his termination. As counsel for the Company puts it, "he is clearly a disgruntled former employee with an ax to grind against BCN." (R. Br. at p. 23.) It is reasonable to consider such an argument in the case of an employee who has been fired for cause and who feels aggrieved about the employer's poor opinion of his performance and the resulting impact on his future career prospects. It is far less reasonable to lend credence to such an argument if the employee in question was merely a victim of economic downsizing. While obviously within the realm of possibility, it strikes me as unlikely that Wales would commit perjury as a means of punishing his former employer for laying him off due to a need to reduce operating expenses. Given these realities, it is necessary to examine the circumstances related to the termination of Wales' employment.

Various corporate managers testified to dissatisfaction with Wales' performance as manufacturing manager. The primary reported deficiency in Wales' performance concerned his asserted inability to complete projects in a timely manner.[10] While this was alleged to be a habitual problem, the Company provided documentary proof as to only one example. The evidence clearly shows that as early as the evening of May 28 Stowell ordered Wales to "[d]ocument the file with the reasons of poor quality and harassment of a fellow employee" that purportedly led to the terminations of Shapley and Schantz. (R. Exh. 8.) When Wales failed to comply by June 10, Stowell sent him an e-mail directing that he "get it done today. I do not want to have any issue arise and find we have not done the documentation." (R. Exh. 9, p. 1.) Wales again failed to comply. On August 21, Adams wrote to another manager warning that if Wales failed to complete this task by the end of the day, "Steve will be written up!" (R. Exh. 10.) It was not until the beginning of September that Wales actually completed this assignment.

The Company strongly asserts that Wales' foot dragging in preparing this important material was proof of its contention that Wales was chronically late in meeting deadlines. I reject this view. Instead, I conclude that his explanation for his lengthy delay in completing this assignment is both logical and consistent with his overall position. He testified that he failed to comply with the order to document the file with evidence that Shapley and Schantz were fired for poor quality work and harassment of another employee, "because those two reasons didn't have anything to do with why they were fired and so I felt just real uncomfortable and avoided it and didn't do it." (Tr. 331.) In other words, having participated in the unlawful termination of the two employees, Wales attempted to avoid compounding his wrongful behavior by also participating in the concealment of those same unlawful acts.

The Company presented no documentary evidence in support of its position that Wales was fired for poor performance as a manager. The Company's handbook provides that its personnel files are designed to "maintain an accurate record of each employee's history and current employment status with the company." (R. Exh. 7, p. 8.) Despite this, Wales' personnel file was not offered into evidence, nor were any evaluations or disciplinary reports.[11] In fact, the evidence shows that the primary reason for Wales' termination was corporate downsizing. For example, in an affidavit prepared in February 2004, Adams noted dissatisfaction with Wales' job performance, but also clearly stated,

> I was involved in the decision to eliminate the manufacturing manager position and to terminate Steve Wales' employment.

[10] Other alleged reasons for unhappiness with Wales' performance involved assertions that he spent too much time in his office, wrote too many e-mails, and had poor relations with some of the production staff. Corporate management failed to provide any contemporaneous documentation whatsoever regarding these alleged deficiencies.

[11] Wales' immediate supervisor, Jeffrey Gillesse, testified that several months before Wales was terminated he warned Wales that he would be placed on a "performance improvement type plan." (Tr. 925.) No such plan was placed into evidence.

> It was primarily due to the need to reduce expenses due to the company's decreased sales and order backlog.

(GC Exh. 59.) Similarly, while citing performance as a consideration, Chief Financial Officer Jeffrey Gillesse testified that Wales was "involved in a group that was laid off or positions eliminated as of September 10." (Tr. 927.)

In sum, the evidence shows that, apart from whatever undocumented concerns the managers felt about Wales' performance, he was terminated due to corporate downsizing arising from a need to reduce expenses in a bad business situation. Tellingly, he was never replaced and the position of manufacturing manager appears to have been permanently eliminated. As a result, there is little or nothing in the circumstances of Wales' termination that would suggest a strong motive to falsely accuse his former employer of unlawful conduct or to impel him to offer perjured testimony in support of such an accusation.

Finally, this is not a case where a disgruntled former employee's uncorroborated testimony forms the heart of a charging party's accusation of unfair labor practices. To the contrary, Wales' account is simply one piece of a mosaic of evidence establishing that Shapley and Schantz were unlawfully discharged. I will examine this additional evidence in detail in the legal analysis portion of this decision. Suffice it to say at this point that such evidence includes the highly suspicious timing of the discharges, the inconsistent treatment of the fired employees when compared to others similarly situated, the striking deficiencies in the Company's investigation of the employees' alleged misconduct, and the assertion of a purely pretextual reason in support of the discharge decision. All of these circumstances lend powerful support and corroboration to Wales' account.

Returning to the events of May 28, it will be recalled that Stowell ordered Wales to immediately terminate the employment of Shapley and Schantz. Wales proceeded to contact Carol Rogers, a human resources official, to direct her to prepare the necessary paperwork for the terminations. He did not inform her of the reasons for the termination decisions. At approximately 3:15 p.m., Wales approached Shapley on the shop floor. He instructed him to turn off his machine. The two men went to Rogers' office where Wales informed Shapley that he was being discharged. When Shapley asked for the reason, Wales told him that he "didn't meet the criteria anymore." (Tr. 29.) Wales added that, "there's quality issues involved and everything else." (Tr. 29—30.) Becoming angry, Shapley responded, "I'm going to find out the real reason why I was fired." (Tr. 303.) He then threatened Wales, but calmed down before engaging in any inappropriate behavior. He was escorted by Gilbert while he gathered his belongings and left the plant.

Wales then approached Schantz and took him into Rogers' office. He told him that he was being terminated because he "did not fit in." (Tr. 69.) Wales added that he had the feeling that Schantz was not "happy" at the plant. (Tr. 70.) Schantz then asked if his termination had anything to do with his prior suspension for quality issues, noting that he had not had any quality problems since the suspension. Wales testified that,

> I don't think I said anything because I knew what he was saying
>
> was the truth and I just couldn't really look him in the eye or
>
> make any comment because what he was saying was true.

(Tr. 306.) Schantz reacted calmly to his termination and was escorted while he gathered his things and left the facility.

As soon as Shapley arrived at his home, he telephoned Arnold. He reported that he had been discharged. He also advised her that he had obtained names and addresses of employees as he had been instructed to do. Arnold directed him to attempt to obtain statements from employees regarding the events of that day. Arnold also testified that the startling events of this day caused her to suspend organizing efforts for a period of time.

At 5:10 p.m. on the 28th, Wales e-mailed Stowell, Gillesse, and Adams, informing them of the discharges and reporting that Shapley had told Gilbert that, "he intends to find out exactly why he was terminated. He told Dan [Gilbert] that he will be back." (GC Exh. 12.) As previously indicated, Stowell replied by instructing Wales to "[d]ocument the file with the reasons of poor quality and harassment of a fellow employee." (R. Exh. 8.)

After resuming its organizing campaign,[12] the Union scheduled a meeting for employees of the Company on Sunday, June 29, 2003. Notices were printed, explaining that the purpose of the meeting was to "discuss and answer questions concerning the recent organizing efforts at Bliss." (GC Exh. 5.) Various employees attended this meeting.

Several witnesses testified regarding the behavior of Supervisor Gilbert on the Monday morning following the union meeting. Jason Sayles reported that Gilbert approached him "pretty close to first thing in the morning." (Tr. 237.) Sayles testified that Gilbert asked him "what went on in the meeting on Sunday, the day before, and I told him I didn't want to tell him." (Tr. 238.) Gilbert asserted that he had heard that Sayles was "one of the big-wigs of the meeting." (Tr. 238.) Sayles denied this. Shortly thereafter, Gilbert approached Moran. Moran testified that Gilbert asked him if he had attended the meeting, noting that he had heard that "a lot of employees went to this meeting." (Tr. 113.) Moran denied attending.[13]

Another employee, Douglas Edinger, testified that, by 9 a.m., he had already heard that Gilbert "was talking to some of the employees about a union meeting that had been on Sunday. So I decided I'd walk in [to Gilbert's office] and tell him I was there." (Tr. 271.) After being so informed, Gilbert asked Ed-

[12] The Union's organizing campaign ultimately met with success. Following an election, on September 10, 2004, the Board issued a decision certifying the Union as the collective-bargaining representative of the unit. *Bliss Clearing Niagara, Inc.*, 7-RC-22659 (2004).

[13] Moran testified that he actually did attend the meeting.

inger, "who else might be there." (Tr. 271.) Edinger declined to provide this information. The two men then engaged in a general discussion about the "pros and cons of unions." (Tr. 272.) Edinger testified that Gilbert's final comment on the subject was that "Ben [Landriscina] will close the place . . . [i]f the union came in." (Tr. 272.)

In his testimony, Gilbert was examined regarding his conversations with employees on the day after the union meeting. His responses, while providing substantial corroboration to the testimony of Sayles, Moran, and Edinger, also cast a powerful negative illumination on the issue of his own credibility as a witness in these proceedings. On direct exam, Gilbert confirmed that, "I asked a few people that Monday after they had that meeting Saturday or Sunday or whenever it was. I had asked a few people how their weekend was."[14] (Tr. 808.)

Disingenuously, Gilbert went on to observe that, "I asked a few employees how their weekend was, which is not out of the ordinary. It just happened to be the Monday after a union meeting." (Tr. 808.) He then narrowed this down significantly, reporting that "I asked most of them how their weekend was. I asked a couple of them how their Sunday was."[15] (Tr. 808). He noted that a few of the employees responded by making negative comments about the Union.

Gilbert confirmed that Edinger came into his office and told him that he had attended the union meeting, claiming that the reason for his participation was "to be an asshole." (Tr. 809.) Gilbert denied that he told Edinger that Landriscina would close the plant in the event the employees decided to obtain union representation.

On cross-examination, Gilbert retreated from his contention that his questions to employees were merely general expressions of interest in the quality of their preceding weekend. The examination as to this point proceeded as follows:

> COUNSEL: And I, I believe your testimony was, on direct, was that you asked people how their weekend was. Isn't what you asked them how their Sunday was?
> GILBERT: I asked a couple people how their Sunday was.
> COUNSEL: And you were referring to the union meeting, weren't you?
> GILBERT: Yeah, I guess you can interpret that, yeah.
> COUNSEL: That's what you were, correct?
> GILBERT: Correct.
> COUNSEL: And that's how they took it?
> GILBERT: Yep.

(Tr. 871.) From all of this, it is apparent that Gilbert ultimately conceded that he intended to interrogate employees regarding their participation in the union meeting. This clearly corroborates the testimony of the employees who were on the receiving end of this conduct. Furthermore, Gilbert's evasive dance around this damaging issue served to generally undermine his credibility, including the reliability of his claim that he did not threaten Edinger with plant closure in the event of unionization. I reject this assertion, concluding that Edinger's description is entirely consistent with Gilbert's pattern of conduct in response to the union meeting held on the preceding day. In addition, I conclude that Gilbert's evasive and disingenuous testimony regarding his interaction with employees after the union meeting demonstrates his consciousness of improper conduct.

On August 18, 2003, the Union filed the initial unfair labor practice charge in this case, alleging that the terminations of Shapley and Schantz were motivated by a desire to retaliate for union organizing activities. (GC Exh. 1(a).) Shortly thereafter, Wales reported that he began to feel "like the world was kind of crashing down" on him. (Tr. 347.) While riding back from lunch a few days later, CFO Gillesse informed Wales that the unfair labor practice charge had been filed. Wales testified that he responded by observing that, "I just kind of said yes to they were fired for trying to start a union." (Tr. 342.) Gillesse reminded Wales that Landriscina wanted written documentation regarding the discharges sent to him immediately. He instructed Wales to finish this task that evening and Wales stayed late to do so. He e-mailed his draft to Gillesse.

Because upper management was not satisfied with Wales' report regarding the discharges, Gillesse ordered him to conduct an interview with the employee alleged to have been the victim of harassment by Shapely and Schantz. The interview was scheduled for September 4, and Gilbert was to be a participant. While Wales and Gilbert waited for the employee to arrive, they engaged in conversation. Wales testified that he told Gilbert that he felt very uncomfortable conducting the interview so long after the fact, noting that,

> this whole thing is—is happening because Mike Shapley and Dewey Schantz have filed suit against the NLRB and I said I can just see this going to trial and I'll get subpoenaed and it's going to really put me in a bad position because I'm going to tell the truth on the stand, which then is going to hurt the company and I said I'm almost—I said I'm damned if I do and damned if I don't.

(Tr. 367.) Gilbert responded by telling Wales that if he were to be asked about the Union, he planned to respond by saying, "what union?" (Tr. 368.) Wales noted that, while making this statement, Gilbert gave a "mischievous smile." (Tr. 431.) The Company terminated Wales' employment several days later.

On October 31, 2003, the Regional Director filed the original complaint in this matter, alleging a number of violations, including those arising from the terminations of Shapley and Schantz. (GC Exh. 1(c).) Trial was scheduled for January 13, 2004. At this point in the chain of events, the focus of the narrative must shift to the second major area of controversy in this case, the Company's treatment of Employee Moran once it became aware of his role as a witness in the upcoming Board proceedings.

Moran testified that Gilbert approached him on January 5. He described their ensuing conversation, recounting that Gilbert told him that,

[14] Gilbert's claim that he did not know if the meeting was on Saturday or Sunday is a blatant evasion. As his subsequent testimony demonstrates, he was well aware that the meeting was held on Sunday.

[15] Although Gilbert testified that he asked only a couple of employees about Sunday, in a prior affidavit he reported that he asked six employees, "[h]ow was your Sunday?" He identified each of those employees by providing their initials. (GC Exh. 51, p. 3.)

> the Company wanted to know if anyone in the shop had information about the NLRB proceeding[s] that were happening on the 13th. And he asked me a couple of questions about the union . . . . He then asked me if I thought that the Company fired Mike and Dewey for their participation in the union. And I told him, yes, I did think so.

(Tr. 115.) Gilbert asked Moran what led him to this conclusion. Moran reminded Gilbert that they had conversed on the day of the terminations and that Gilbert had mentioned Schantz' organizing activity. Whereupon, Gilbert responded that, "the union participation was not the only reason they got fired." (Tr. 116.)

On the following day, counsel for the General Counsel issued a subpoena to Moran requiring his testimony at the upcoming trial. (GC Exh. 6.) Also on this date, he was asked to attend an interview with the Company's attorney.[16] Moran testified that during this interview, he related "the story about Dan Gilbert approaching me on May 28th, the year before, and asking about union participation the day that Mike and Dewey got fired." (Tr. 117.)

On January 9, the Regional Director issued an order postponing the trial from January 13 to April 19, "[i]n order to permit time to complete the investigation of a newly filed unfair labor practice charge." (GC Exh. 1(h).) As a result, Moran reported to work on the 13th. Early in his shift, he was examining a troublesome machine that was operated by Eric Hutchings. Gilbert called Moran on the radio and instructed him to stop speaking to Hutchings, telling him "this behavior will not be tolerated." (Tr. 119.) Moran testified that he later went to see Gilbert and Gilbert told him not to talk to employees in the aisle, "with all of the stuff going on with the union and the NLRB. I don't want you to get mixed up in it." (Tr. 120.)

John Heatherington provided substantial corroboration of Moran's description of Gilbert's behavior on this date.[17] He testified that he overheard the radio conversation between the two men. He reported that Gilbert told Moran that he thought he was going to be on vacation that day. Moran responded that he had turned in a vacation slip but wanted it to be cancelled. Gilbert retorted, "What happened? You can't make up your mind whether you want to come to work or you want to be on vacation?" (Tr. 197.) Heatherington was so struck by Gilbert's behavior that he approached him later and criticized him for being "sarcastic" and "inappropriate." (Tr. 197.) Hutchings also corroborated Gilbert's radio call to Moran, testifying that Gilbert complained about Moran's excessive standing around and talking.

Shortly after his chastisement by Gilbert, Moran filed an unfair labor practice charge alleging that he had been "harassed" due to his having been subpoenaed as a witness in the trial involving the discharges of Shapley and Schantz. (GC Exh. 1(j).) Approximately a week later, Moran was assigned to an important project, the rebuilding of two Accuride presses for a customer in Canada. On February 13, 2004, Gilbert and Gillesse issued Moran a corrective action report for "[o]verall low productivity issues," most of which arose from Moran's performance on the Accuride project. (GC Exh. 7, p. 2.) Management contended that Moran had taken excessive time in completing a wiring task, left his work area prematurely, and failed to follow Gilbert's instructions in connecting an electrical box. It was also alleged that Moran had spent time in an unnecessary review of the functioning of another machine. Based on this list of infractions, Moran was suspended for 3 days without pay.

Moran returned from his suspension on February 18. On the following day, he placed a vacation request slip on Gilbert's desk, seeking authorization to take a half-day off on February 20. He reported that he placed the slip on Gilbert's desk because Gilbert was not at work that day. On February 20, Moran worked until 11 a.m., and then departed. He testified that he did not see Gilbert that morning and conceded that, "I made no attempt to." (Tr. 139.) Gilbert reported that, although he observed Moran at work that morning, he could not find him in the afternoon. When he inquired further, Heatherington told Gilbert that Moran had filled out a vacation slip. Gilbert located this slip on his desk, "tucked into the paperwork on the daily logs." (Tr. 826.)

The next workday was Monday, February 23. Moran testified that he decided not to report for work on that day due to an injured foot. Shortly before the start time of his shift, he telephoned Heatherington and informed him that he needed a vacation day and asked him "to convey that to the supervisors."[18] (Tr. 203.) Heatherington told Gilbert and a second supervisor, Archie Howard.

On February 24, management issued Moran a second corrective action report regarding his manner of notifying the employer of his plans to take vacation time. (GC Exh. 8.) He was cited for violating the Company's attendance policy on both February 20 and 23. The sanction consisted of a written warning. On March 23, Moran responded by filing unfair labor practice charges arising from the two corrective action reports issued to him in February. (GC Exh. 1(l).) Shortly thereafter, the Regional Director filed an amended consolidated complaint incorporating these allegations. (GC Exh. 1(n).)

Soon after Moran filed these charges arising from his discipline, Gilbert had a discussion with Heatherington. Heatherington testified that Gilbert informed him that Moran had filed the charges and asserted that, "it's not a good thing." He went on to explain that,

> he knows of an electrician, his neighbor, works over in Holland [Michigan]. And we really need to make some changes. And Larry really needs to be gone.

[16] At this time, a different law firm represented the Company.

[17] I found Heatherington, a veteran employee at the facility, to be a highly credible witness. He struck me as a man who was not only mature in years, but also in judgment. As the maintenance team leader, his participation in this trial placed him in an awkward position between management and employees. He noted that he felt too old to get involved in the organizing issues, but also felt "obligated" to be truthful regardless of whether his statements would "have a bad reflection upon me." (Tr. 213—214.) Following this course, he provided testimony regarding Gilbert's misconduct while also commenting unfavorably about Moran's work performance. I conclude that Heatherington called it as he saw it without thoughts of fear or favor.

[18] Heatherington was appointed as the team leader of the maintenance department in April or May 2004. Therefore, at the time that Moran called him, he was simply an ordinary employee.

(Tr. 207.) This conversation took place at about the time that Heatherington was appointed team leader for the maintenance employees.

In the following month, the Company began active steps to address a major electrical project involving the removal of a defective transformer and the resulting need to rewire a significant portion of the plant so that various machines would receive power from the remaining transformers. Maintenance time logs show that Moran worked on preliminary aspects of this project on April 14, 15, 16, 20, and 21, 2004. (GC Exhs. 36, 37, 38, 40, and 41.) Moran testified that during this period he was involved in discussions with Gillesse, Gilbert, and Heatherington concerning this task. A decision was reached to use the in-house workforce to perform the needed work. Moran proposed that a consultation with an outside expert be obtained "to make sure I was doing the job properly with the proper hook-ups and the tear down." (Tr. 579.) This proposal was approved and an electrician, Dan Van Sweden, was retained. On April 21, Moran and Van Sweden met at the plant to review the project. Thereafter, the logs show that Moran worked on the project on April 27, 28, 30, and May 3. (GC Exhs. 42, 44, 45, and 46.)

Heatherington testified that, in mid-May, he met with Gilbert to schedule the core work on the project. It was necessary to choose a day on which the plant was not operating since the project required the shutdown of electrical power inside the facility. The two men selected Saturday, June 5, 2004. This date was chosen because the workers would not have worked on the preceding Memorial Day holiday. As a result, they would not be entitled to time and a-half pay for work performed in excess of 40 hours per week.[19] Heatherington also testified that he and Gilbert selected five men in addition to themselves to perform the Saturday work: Bruce Shade, Alex Dicks, Dave Boomer, Scott Binkowski, and Larry Moran. Of these, Shade and Moran were maintenance department employees while the others were production workers. Heatherington, in his role as maintenance team leader, informed Shade and Moran "to block off your calendar on June 5th because that's the day we are going to attack this transformer project." (Tr. 633.)

During the last week of May, Gilbert completed one of the Company's overtime request forms in preparation for the transformer project. On the form, he sought approval of overtime for a number of employees, listing the number of hours required and the purpose of the overtime for each employee. On the copy of this form received in evidence (GC Exh. 49), every employee selected for the project has these two entries except Moran. Moran's entry does not contain any number of hours to be worked, but does list the reason for his overtime in order "to connect clean power between C&B bay." (GC Exh. 49.)

On June 1, Gilbert completed a second overtime request form for the Saturday work. On this form, Moran's name is crossed out. On the section of the form listing the number of hours to be worked, Gilbert blacked out Moran's entry.[20] Despite this, Moran is still listed as being needed in order to "connect clean power between C&B bay." (GC Exh. 50.)

Moran's schedule for the week beginning on May 30 was unusual. Monday, May 31, was the Memorial Day holiday. Moran took a vacation day on Tuesday. The trial in this case began on Wednesday, June 2. Trial continued on Thursday and Friday. At the beginning of the trial, counsel requested an order for sequestration of witnesses. I granted this request and directed each lawyer to select a person from each side who would remain present in the hearing room throughout the trial. Counsel for the Company selected Adams for this purpose and she was present throughout the proceedings that week. Counsel for the General Counsel selected Moran for the same purpose and he was also present throughout. He sought and obtained approval to use vacation time for this purpose.[21]

Heatherington testified that on June 3, Gilbert approached him stating that, "he wanted to let me know that Larry [Moran] would not be working on the project that Saturday per Karen Adams." (Tr. 634.) Heatherington indicated that until this conversation he had assumed that Moran would be part of the crew that handled the Saturday work.

On Saturday, June 5, Moran reported for work at approximately 6 a.m. Both Moran and Heatherington testified that shortly after Moran's arrival, Heatherington informed him that, "Dan Gilbert told me that you would not be working on this project today per Karen Adams." (Tr. 635.) Heatherington noted that the crew that performed the work was able to complete the project, but that there would have been "plenty of work" for Moran to perform that day.[22] (Tr. 640.)

On June 8, the Union filed a new unfair labor practice charge arising from the failure to utilize Moran's services on June 5. On the following day, Gillesse addressed a memo to Moran, notifying him that he would receive pay for 2 hours of work on June 5 pursuant to the Company's policies. Gillesse cited the provision of the handbook stating, "[i]f you are asked to report to work on any day . . . you shall receive a minimum of (2) two hours pay at your regular rate if no work is available." (GC Exh. 32.) Also on that date or the following day, Heatherington attended a meeting at which Adams was present and the subject of Moran's participation on the Saturday project was discussed. Heatherington testified that Adams asserted that Moran was

[19] I recognize that Gilbert disputed Heatherington's account. He contended that the decision to do the work on June 5 was reached "[j]ust a few days prior to that Saturday." (Tr. 838.) I reject this claim. Gilbert concedes that he and Heatherington had discussions about the project long before the 5th. I credit the logic of Heatherington's testimony regarding the cost saving reason that led the two men to select June 5 for the Saturday work. This factor would have been apparent to them well in advance of the actual date and it would have been prudent to provide early notification to the workforce to assure that the work could go forward on this advantageous day. Finally, throughout these proceedings, I have concluded that Heatherington was a particularly credible witness, while much of Gilbert's testimony struck me as self-serving and highly partisan.

[20] While there are various interlineations on this form, the only cross out of overtime hours appears in Moran's listing.

[21] Moran testified that on both June 3 and 4, he "stopped in the shop and told [Supervisor] Archie Howard that I had to return to the courtroom." (Tr. 571.) The Company did not produce testimony from Howard.

[22] In fact, one of the employees assigned to the Saturday work, Dave Boomer, "didn't particularly want to come in because he had a wedding that day that he had to attend." (Tr. 674—675.) On Saturday, Boomer left the job early, before the work was completed.

removed from the work schedule because management could not "depend on whether he was going to be there or not because he had not called in when he was absent Thursday or Friday."[23] (Tr. 642—643.) This was a reference to the days that Moran spent seated at the counsel table a few feet from Adams herself.

On July 2, the Regional Director issued a complaint alleging that Moran's exclusion from the Saturday schedule violated the Act. Shortly thereafter, counsel for the General Counsel filed a motion to consolidate cases. At the resumption of proceedings on July 26, I granted this motion.

B. Analysis of the Discharges of Shapley and Schantz

The General Counsel contends that Shapley and Schantz were unlawfully dischargedbecause of their union organizing activities. In order to evaluate such a claim, I must employ the analytical framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[24] In *American Gardens Management Co.*, 338 NLRB 644 (2002), the Board reiterated the elements of this test, noting that the General Counsel must show that an alleged discriminatee engaged in protected activity, that the employer was aware of such participation, that the discriminatee experienced an adverse employment action, and that there existed a motivational link between the protected activity and the adverse action. The Board noted that if these elements are established by a preponderance of the evidence,

> such proof warrants at least an inference that the employee's protected conduct was a motivating factor in the adverse employment action and creates a rebuttable presumption that a violation of the Act has occurred.

338 NLRB at 645. The burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." Id. [Footnote omitted.]

At the first step in this analysis, the General Counsel presented the testimony of the two alleged discriminatees. Shapley reported that after his suspension in April 2003, he began to discuss the possibility of union organizing with his coworkers. He contacted one union and was referred to a second union. He telephoned Arnold, an official of that union, and left a message expressing interest in organizing at the Company. He further testified that, after some delays, he spoke with Arnold and was instructed to gather preliminary information from his coworkers. He engaged in this information gathering activity on May 28, beginning in the parking lot before his shift began and continuing throughout the day.

Schantz testified that he spoke to Shapley on that morning and provided him with his contact information. Later on, Shapley requested that Schantz obtain similar information from another employee. Schantz reported that he did obtain this information and provided it to Shapley that afternoon.

The Company contends that this testimony regarding protected activities is not credible or corroborated by reliable evidence. The record belies this assertion. Three employees confirmed that Shapley had approached them in order to discuss union organizing at the Company. One of those employees was Heatherington. I have already noted that Heatherington was a particularly credible witness who carefully avoided tailoring his testimony to suit any party's desires. Far from being a union supporter, Heatherington indicated that he felt he was too old to become involved in organizing activity and was concerned about potential adverse consequences to himself. Nevertheless, he corroborated Shapley's testimony regarding his organizing activities prior to the discharges.

Other factors apart from the testimony support a conclusion that Shapley and Schantz engaged in protected activities prior to their discharges. For example, I find the sequence of events to be persuasive. Immediately prior to the organizing activities, the Company "abandoned" a bonus program designed to encourage quality work and substituted a disciplinary policy. (R. Br. at p. 3.) Shapley and Schantz were among those first targeted under the new policy. It is logical that their organizing activities would follow on the heels of this sequence of events.

Counsel for the Company contends that evidence of organizing activity is severely undercut by the failure of the General Counsel to introduce supportive documentation, including the "slips of paper" containing employees' contact information allegedly gathered by Shapley and Schantz on the day of their terminations. (R. Br. at p. 16.) I disagree. Arnold, the union official, was cross-examined on this point. She testified that she was given "a bunch of little pieces of paper" containing names and addresses. (Tr. 291.) Counsel then asked:

> COUNSEL: And did you—did you retain those?
> ARNOLD: Yes.
> COUNSEL: Do you have those with you today?
> ARNOLD: Yes.
> COUNSEL: And approximately how many of those did you have?
> ARNOLD: I didn't count all the pieces of paper before I came in, but maybe about 15.

(Tr. 291.) Arnold was not asked to produce these items, and I conclude from her unchallenged testimony that they were in her possession.

Beyond the slips of paper that Arnold brought to the hearing, there is an additional item of documentary evidence that supports Shapley's testimony regarding his organizing activities. On September 4, Wales prepared a memorandum documenting his interview with Randy Rice, an employee who was alleged to have been the victim of harassment by Shapley and Schantz in the months preceding their discharges. In that memo, he notes that Rice reported that Shapley had told him "that without a union, you are getting nowhere." (GC Exh. 25.) While the Company vigorously assaults the credibility of Wales' trial testimony, it does so on the basis that he is disgruntled due to his discharge from employment. Therefore, it is particularly

[23] Heatherington's account of this meeting is a prime example of his objectivity and forthrightness as a witness. While providing testimony damaging to one of his supervisors, he also candidly observed that during the meeting in question he was highly critical of Moran's overall work performance, noting that he failed to demonstrate "enthusiasm and zeal" for his work. (Tr. 662.)

[24] The Supreme Court approved the Board's choice of methodology in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399—403 (1983).

significant that Wales wrote his account of Rice's description of Shapley's comments prior to his termination from employment. I conclude that Wales' account lends considerable support to Shapley's testimony.[25]

I find that Shapley and Schantz had engaged in protected union organizing activity prior to their discharges. I also conclude that the Company was aware of their protected activities. In reaching this conclusion, my analysis has begun with the large quantum of direct evidence of such knowledge. First and foremost, I have already noted that I credit Wales' account of the events at issue. He testified that shortly after lunch on May 28, Gilbert reported to him that Shapley and Schantz "had been kind of trying to talk to people out in the shop about getting support to have a vote for a union." (Tr. 299.) Wales then conveyed this information up his own chain of command to Stowell and Adams. He was later advised that it had reached the highest level, Landriscina.

Moran's testimony strongly supports Wales on this point. Moran reported that on May 28, Gilbert approached him, asserting that, "I've heard some people are trying to form a union and they're asking for names and addresses." (Tr. 111.) He made specific mention of Schantz and ominously observed that, "there's going to be some changes around here today." (Tr. 111.)

Counsel for the Company attacks the reliability of this testimony, noting that Moran has "a financial interest in the outcome of this case." (R. Br. at p. 18.) While this is true, it must be kept in proper perspective. Moran's pecuniary stake in the outcome is actually quite limited. If he prevailed in all of his claims, he would be entitled to back pay for his 3-day suspension and for the uncompensated portion of his wrongfully eliminated Saturday work shift on June 5. I do not find that the extent of his financial interest is sufficient to substantially impact his credibility. Instead, I am impressed by the fact that Moran gave a similar account at a time when he had absolutely no financial stake in this proceeding. It will be recalled that prior counsel for the Company interviewed Moran on January 6, 2004. Moran testified that during this interview, he informed counsel that Gilbert had approached him on May 28, "asking about union participation the day that Mike and Dewey got fired."[26] (Tr. 117.) When Moran gave this account, his only role in this case was as a potential witness who had been subpoenaed by the counsel for the General Counsel.

Finally, I note that while Gilbert denied knowledge of union activities by Shapley and Schantz on May 28, his testimony regarding his own activities on that day is highly suspicious. Although he was not their supervisor, he testified that he noted that the two men were away from their work areas and carried this information all the way to the chief executive officer. Peculiarly, while making this report about employees that he did not directly supervise, he opined, "these two individuals would not be missed if they were terminated." (Tr. 883.) Thus, his own version is eerily similar to the General Counsel's theory as to what happened on May 28—that Gilbert focused on Shapley and Schantz and reported their union activity to higher management resulting in their immediate discharges.

Beyond this impressive quantum of direct evidence of employer knowledge of union activities, I have also considered the circumstantial evidence involved in this case. Very recently, the Board has emphasized that,

> the knowledge element of the General Counsel's initial burden may be satisfied by evidence of the surrounding circumstances, including contemporaneous 8(a)(1) violations, the timing of the alleged discriminatory action, and the pretextual nature of the reasons advanced by the respondent for the action taken. [Citation omitted.]

Atlantic Veal & Lamb, Inc., 342 NLRB No. 37 (2004), slip op. at p. 2. This type of circumstantial evidence exists in this case and lends support to a finding of employer knowledge. Detailed discussion of this evidence is more appropriately made later in the *Wright Line* analysis.

At the next step of the evaluation process, it is obvious that Shapley and Schantz were subjected to an adverse employment action. Indeed, they suffered the ultimate workplace sanction.

Having found that the two men engaged in union organizing activities, that their employer was well aware of their participation in those protected activities, and that they were subjected to adverse action, I must next determine whether there is a motivational link between the employer's knowledge of protected activity and the imposition of the employment sanction. The Board requires that the totality of the evidence be considered. In other words, a conclusion must be derived from the record as a whole. See, *Sears, Roebuck Co.*, 337 NLRB 443 (2002), citing *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992). Both direct and circumstantial evidence should be examined. Probative circumstantial evidence includes,

> such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records or offenses, deviation from past practice, and proximity in time of the discipline to the union activity.

Embassy Vacation Resorts, 340 NLRB No. 94 (2003), slip op. at p. 3.

Often, the focus of analysis is on the circumstantial evidence.[27] By contrast, in this case the assessment properly begins with the persuasive direct evidence of animus toward Shapley and Schantz' involvement in protected activities. In particular, the manager of manufacturing operations at the time under consideration made explicit that which is often only in-

[25] I recognize that Rice testified that Shapley "never did talk to me about the union." (Tr. 720.) I do not credit this. It is simply one of many examples of Rice's tendency to tailor his testimony to support the Company's needs and to prevent the potential reinstatement of former coworkers that he dislikes.

[26] Moran testified that in addition to the Company's attorney, Adams, Gillesse, and Rogers attended this meeting. Nobody contradicted Moran's testimony regarding what transpired at the meeting.

[27] Indeed, a finding of unlawful motivation may be based exclusively on circumstantial evidence. See, for example, *Tubular Corp. of America*, 337 NLRB 99 (2001).

ferred regarding unlawful motivation. Wales credibly testified that he received Gilbert's information about the organizing activity and reported it to his superiors. Later that day, he was summoned to the CEO's office and informed that the Company's top official, Landriscina, "wanted those individuals fired immediately." (Tr. 301.) In further explanation, Wales was told that Landriscina "was really adamant and he said he will not have a union in the shop at Bliss."[28] (Tr. 302.) Having received these marching orders, Wales immediately made the necessary arrangements with the human resources representative and proceeded to meet individually with Shapley and Schantz and inform them that they were discharged. In this manner Gilbert's prediction, made in connection with his awareness of organizing activity, that "there's going to be some changes around here today" was dramatically fulfilled. (Tr. 111.)

As I have previously noted, I have carefully considered the assault on Wales' credibility mounted by the Company. In addition to finding Wales' demeanor and presentation to be worthy of credit, I have rejected the argument that the particular circumstances of his termination involving the permanent abolition of his position would lead him to seek revenge through outrageous conduct involving the manufacture of false evidence. Lastly, I am impressed and persuaded by the circumstantial evidence that sheds corroborative light on his account.

The first and perhaps least disputable item of circumstantial evidence is the timing of the adverse employment action. The Board has recently observed that,

> [i]t is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation. [Citations omitted.]

Davey Roofing, Inc., 341 NLRB No. 27 (2004), slip op. at p. 2. In *Davey*, the adverse employment actions were taken on the next business day following a union meeting attended by the affected employees and on the same day that the company received a union petition signed by those employees.

In this case, Shapley was discharged on the same day that he escalated his organizing activities, moving from mere discussions with coworkers to active collection of information for transmission to the Union's organizing official. Similarly, Schantz' termination was effected on the date that he first engaged in protected activity, providing information for use by the Union and soliciting another employee to do likewise. Furthermore, both men were fired on the day that management first learned of this concrete organizing activity. In a venerable and often-cited case, the Second Circuit upheld the Board's determination of unlawful motivation where an organizing campaign was initiated in the first week of June, the union requested voluntary recognition on June 9, and the employer laid off numerous employees on June 9 and 10. In endorsing the Board's analytical approach, the Court took note of the "stunningly obvious timing." *NLRB v. Rubin*, 424 F.2d 748, 750 (2nd Cir. 1970). The evidence in this case mandates the same observation and conclusion. As the Board has phrased it, "where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised." *McClendon Electrical Services*, 340 NLRB No. 73, slip op. at fn. 6 (2003).

In addition to this striking evidence of temporal proximity, the manner of scheduling of the terminations is also circumstantial evidence supporting the General Counsel's arguments. I note that the two men were fired on the second workday following the Memorial Day holiday. Had they been terminated a few days earlier, the Company would have saved the expense associated with holiday compensation.[29] Adams testified that she thought that she and Stowell had conferred on May 22 and decided to terminate Shapley and Schantz on May 28.[30] No explanation was offered as to why supposedly carefully preplanned terminations were implemented after a holiday weekend and during the middle of the following workweek.

Beyond the unusual choice of date for the terminations, it is also noteworthy that the processing of the terminations was carried out precipitously. Although the decision to terminate the employees was allegedly made well in advance of May 28, the evidence shows that the human resources manager who would prepare the necessary documents, Carol Rogers, was only informed at the last minute. Wales testified that on May 28, Stowell instructed him to fire the two men immediately. He then met with Rogers and,

> told her the decision had been made to terminate Mike and Dewey. And she was going to, I guess, get whatever paperwork she needed to get ready.

(Tr. 302.) Her surprise was conveyed to Schantz. After Wales terminated Schantz, he departed, leaving Rogers alone in her office with Schantz to complete the paperwork. He testified that she interrupted this chore and asked him why he had been terminated. She went so far as to speculate about the reason, asking Schantz "if you think it has something to do with the 3-day scrap suspension."[31] (Tr. 70.) The very short notice pro-

[28] In this regard, Wales' testimony regarding Landriscina's attitude was reinforced by Edinger's report that Gilbert told him that "Ben [Landriscina] will close the place . . . [i]f the union came in." (Tr. 272.) The Company did not elicit testimony from Landriscina.

[29] The evidence shows that management was certainly interested in this sort of cost saving analysis. For example, the Saturday work shift required for the transformer project was scheduled for June 5, 2004, because overtime pay could be avoided since the employees would not be working in excess of 40 hours that week due to the preceding Memorial Day holiday.

[30] Stowell testified that, although he couldn't "give you a date," his recollection was that the termination decisions were made "the week before the holiday." (Tr. 463.) Gillesse's testimony conflicts with this chronology provided by Adams and Stowell. He asserted that Stowell informed him that Shapley and Schantz were going to be terminated "a couple of weeks" prior to May 28. (Tr. 950.) This would suggest that the decision was purportedly made in mid-May.

[31] I credit the testimony of Wales and Schantz establishing that Rogers was given only last minute notice of the terminations and was taken by surprise. The testimony cited was uncontroverted. The Company did not call Rogers as a witness. I infer that the failure to elicit her testimony was due to the fact that she would have been unable to confirm other managers' assertions that the termination decision had been made well in advance of May 28. See: *Daikichi Sushi*, 335

vided to Rogers and her evident surprise at the turn of events provides support to the General Counsel's contention that the terminations were not carefully preplanned, but rather were ordered as a hasty response to the organizing activity on May 28.

The evidence regarding the timing and manner of Shapley and Schantz' terminations supports Wales' testimony that the two men "were terminated because they were trying to start a union in the shop."[32] (Tr. 401.) As an appellate court once put it in a similar context,

> [t]he abruptness of the discharges and their timing are "persuasive evidence" that the company had moved swiftly to eradicate the . . . prime movers of the union drive.

Abbey's Transportation Services v NLRB, 837 F.2d 575, 580 (2d Cir. 1988).

I conclude that the General Counsel has met his burden of demonstrating that Shapley and Schantz engaged in protected union organizing activities and that the Company was aware of their participation in those activities. I further find that the decision to terminate the two men was substantially motivated by animus against them arising from their participation in the protected organizing activity. As a result, the General Counsel has met his initial burden and the burden now shifts to the employer to demonstrate that the same adverse action would have been imposed regardless of the employees' participation in the union organizing activities.

Before examining the Company's defenses, it is appropriate to consider the precise nature of the Company's burden. The Board has carefully explained that,

> in rebutting the General Counsel's prima facie case—that the protected conduct was a "motivating factor" in the employer's decision—an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.

Hyatt Regency Memphis, 296 NLRB 259, 260 (1989), affd. 939 F.2d 361 (6th Cir. 1991). This point was underscored very recently in *Yellow Enterprise Systems, Inc.*, 342 NLRB No. 77, slip op. at p. 2 (2004), where the Board observed that,

> [o]nce a discharge has been shown to be unlawfully motivated, an employer must establish not merely that it *could have* discharged the employee for legitimate reasons, but also that it actually *would have* done so, even in the absence of the employee's protected activity. [Emphasis in the original.]

Keeping in mind this important distinction, I will now examine the employer's asserted justifications for the discharges of Shapley and Schantz.

The Company advances two such justifications as the actual motivating factors leading to the termination of these employees. First, it alleges that the men were fired for poor work performance. For reasons that I am about to discuss, I conclude that this is simply a pretext advanced to disguise an unlawful act. It is a mere wisp of fog that vanishes when exposed to the sunlight of objective scrutiny.

As its second reason, the Company contends that it discharged these men because it refused to tolerate their harassment of a fellow employee, Randy Rice. This defense presents a far more interesting question. As counsel for the Company correctly argues, there is a considerable trail of documentary evidence demonstrating that management was giving active consideration to the discharge of Shapley and Schantz before the fateful day on which they began organizing support for the Union. After close consideration of what this paper trail says and comparison of its contents with the other evidence of record, I find that it fails to carry the Company's burden of showing that it would have fired the men on May 28 regardless of their union activities on that date.

As to the issue of poor work performance, there is no question that the Company displayed legitimate concern about the problem, a concern untainted by any unlawful animus. Months before the initiation of union organizing, management analyzed employee work performance and concluded that Shapley and Schantz, along with Jensen and Hayes, were deficient. Detailed warning reports accompanied by extensive supporting documentation were prepared and the manufacturing manager conferred with each employee regarding performance improvement. The employees were offered both positive encouragement and imposition of a 3-day suspension sanction in a multifaceted effort to obtain improved work performance.

Just as there is no doubt that management's disciplinary efforts designed to obtain improvement of the employees' work performance were sincere, it is equally clear that they were effective. The evidence showed that this disciplinary process immediately impressed the affected employees. For example, Wales noted on Shapley's warning notice that upon receiving his discipline, Shapley was "in awe."[33] (GC Exh. 2.) More importantly, the Company's quality control records convincingly prove that both men took the warnings to heart. In the weeks after their suspensions, their work performance underwent dramatic improvement.

Turning first to Shapley, the documentation attached to his warning notice showed that during the 7-month period under scrutiny he had made operator errors costing the Company an average of $668 per month. In the 2-month period after his suspension and before his discharge, Shapley made only one operator error costing $110, an average of $55 per month. In other words, imposition of the suspension as part of a plan de-

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NLRB 622 (2001) (adverse inference appropriate where employer failed to produce testimony of the only manager present at a crucial meeting).

[32] Counsel for the Company notes that the first reference to organizing activity in Wales' weekly update reports is not made until late in the month of June. From this, he argues that Wales' own documents undercut his testimony. I do not agree. Wales testified that he knew it was unlawful to fire employees for union activities. He would hardly have been expected to include information in his weekly reports that would tend to show that he had engaged in such illegal conduct.

[33] I speculate that Wales selected this descriptive term because the disciplinary meeting was taking place against the background of the war in Iraq, a campaign that was widely described as having been designed to inflict "shock and awe" on the enemy's forces.

signed to improve performance resulted in a greater than 90 per cent improvement in Shapley's work quality using the form of measurement chosen by the Company.

If Shapley's performance improvement was impressive, that of Schantz was absolutely dramatic. At the time of his suspension, Schantz had made operator errors costing the Company an average of $606 per month. From the initiation of his performance improvement plan through the date of his discharge, Schantz did not make a single operator error. As Stowell conceded in his testimony, at the time that the Company discharged the two men, their error rate "was certainly far better than their history showed in the past." (Tr. 479.) There was nothing in the recent work history of Shapley and Schantz that would have served to justify their discharge on the basis of deficient performance.

In analyzing this question, it is also instructive to compare the results of the performance improvement process for Shapley and Schantz with those obtained regarding the other two employees who were the focus of concern, Jensen and Hayes. In the period between the suspensions and the discharges of Shapley and Schantz, Jensen had an operator error that cost the Company $251. This was more than double the cost of Shapley's similar lone error. In addition, it is noteworthy that Jensen, unlike either Shapley or Schantz, had a prior disciplinary report in May 2001 for "Poor Workmanship—Quality." (GC Exh. 14.) Despite this, Jensen was not discharged or otherwise disciplined.[34]

The remaining subject of the Company's performance improvement program was Hayes. During the period between the suspensions and the discharges at issue, Hayes had an operator error costing $151. Once again, this was larger than Shapley's similar error. Despite this, Hayes remains employed by the Company. During cross-examination of former CEO Stowell, counsel for the General Counsel crystallized the statistical findings regarding the four employees who were being watched for quality issues,

> COUNSEL: Of these four people, Schantz, Jensen, Shapley, and Hayes, looking at the period of the two months of April 2003 and May 2003, the two employees that had the errors that cost the company the most money were Hayes and Jensen?
>
> STOWELL: That is what the report shows.

(Tr. 493.)

This evidence regarding the course of the Company's performance improvement effort may be viewed in two ways. If the Company's intention had been to impose the preliminary sanction and then follow-up with termination of those employees who continued to have significant operator errors, logic would have required the discharge of Hayes and Jensen. If the standard had been a total absence of errors, then Shapley would have been swept into the net as well. However, under no logical frame of reference would it have been reasonable to discharge Schantz, an employee who responded to the performance improvement program by totally eliminating his operator errors.

In fact, it is more appropriate to examine the evidence from the second viewpoint, that the performance improvement plan was not designed to lead to discharges of deficient employees, but was instead intended to alter their performance so that their services would be retained in improved form. The evidence shows that this was management's practice and policy. Adams summarized it as follows,

> We don't necessarily consider everything grounds for termination. . . if somebody's performance is horrific, they would get terminated. If their performance is, okay, we can work with the person, it's up to our managers to work with people, it's up to our managers to deal with We don't terminate everybody unless we think it's worthy of termination.

(Tr. 1062.) This statement of philosophy is entirely consistent with the management approach taken at the time the four men were suspended. The intention was to improve their performance. The plan worked remarkably well. Given this outcome, it defies common sense, logic, and elementary fairness to believe that management would select the two employees who made the best response to the disciplinary action and terminate them from employment while retaining the services of the two poorer performers. The message such action would send to the remainder of the workforce would be completely counterproductive. I refuse to conclude that management would engage in such perverse behavior.[35]

Something else must account for the terminations of Shapley and Schantz. This apparent mystery is solved by reference to the testimony of former manufacturing manager Wales, the very supervisory employee who conducted the original performance improvement process under discussion.[36] By asserting this highly dubious rationale for the discharges, the Company has cast legitimate doubt upon its actions. As was observed in *Amber Foods, Inc.*, 338 NLRB 712–715 (2002),

> The Board has long held that "when the asserted reasons for a [disciplinary action] fail to withstand examination, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the [disciplinary

[34] It is true that Jensen was laid off in September 2003 due to declining sales. Lest it be thought that performance issues were responsible for his layoff, it is noted that Jensen was subsequently recalled.

[35] As further evidence supporting my refusal to give any credence to this possibility, it is noteworthy that Stowell testified that he did not recall "talking about [Shapley and Schantz'] performance over that period of time, April and May" prior to discharging them. (Tr. 509.) He had "no recollection of discussing or reviewing" their performance between their 3-day suspensions and the discharges. (Tr. 513.) Under cross-examination, Adams testified that absent something additional, the performance issue would "probably" not have been enough to justify the discharge of the men. (Tr. 1075.)

[36] My conclusion that the assertion of poor quality work performance as a reason for the discharges was pure pretext also serves as probative circumstantial evidence supporting my findings that Wales was a credible witness and that the actual motivation for the discharges was unlawful animus. See: *Key Food*, 336 NLRB 111, 114 (2001) ("well settled" that when an employer's stated motive is false, it is proper to infer that the true motive is an unlawful one that the employer seeks to conceal).

> action]." *Emergency One, Inc.* 306 NLRB 800, 807–808 (1992), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

In contending that it discharged two employees for poor performance after they had successfully responded to a carefully devised performance improvement plan, the Company has raised this negative inference against itself.

It is now necessary to consider in detail the Company's final defense, that it terminated Shapley and Schantz because they engaged in harassment of a fellow employee, Rice. As previously noted, there is documentary evidence that supports a conclusion that the termination of these employees was indeed under active consideration for this reason. A complete understanding of the situation requires a digression in order to set forth the history of the interactions among those three employees and the Company's responses to it.

All three of the men agree that their original relationship was a good one. Unfortunately, this changed in October 2002. At that time, the Company discharged an employee, Kevin Schantz, who was Duane Schantz' nephew. Contemporaneous documentation shows that Kevin Schantz was discharged for three reasons: the need to reduce the workforce due to economic factors, his threatening conduct toward his supervisor (Dan Gilbert), and his harassment of Rice. In this connection, Rice had informed Gilbert that Kevin Schantz had verbally "ripped me up and down," reducing him to tears. (Tr. 697.)

Everyone agreed that after Kevin Schantz' discharge, the relationship among the three men soured. Duane Schantz ceased talking to Rice on a social basis. When Rice asked him about the change in attitude, Schantz responded to the effect that he did not wish to talk to Rice because he was concerned that what he said could cost him his job.[37] Similarly, Shapley stopped speaking with Rice except to counsel him to "stay out of Dan Gilbert's office." (Tr. 703.) Other employees also avoided social interaction with Rice. Rice estimated that 10 to 15 employees followed this course. One of those employees, Eric Hutchings, testified that,

> people [were] afraid to speak to Randy Rice due to possible disciplinary action, because Randy has a tendency to—well, he causes problems for people and he's allowed to by Dan Gilbert.

(Tr. 265—266.)

The next significant event allegedly occurred on May 7, 2003.[38] On that day, Rice contends that he was approached by Shapley while in the men's room. The two men were alone inside the room. He testified that Shapley confronted him, asserting that,

> you're a suck ass. You can't be trusted. You've got your head so far up this company's ass, no one trusts you.

(Tr. 706.) In a rather peculiar and worrisome coincidence, Rice's testimony regarding Shapley's choice of phraseology is virtually identical to his report as to Kevin Schantz' accusations against him over 6 months earlier.[39] This strikes me as unlikely and raises concern regarding the possibility of manufactured testimony.

In support of his account of the incident with Shapley, Rice contended that Moran had approached the restroom entrance during the confrontation and, after observing the nature of the interaction, abruptly departed without entering the room. In sharp contrast, Shapley denies having any such interaction with Rice and Moran testified that he did not observe the two men together in the restroom on that day.

It is undisputed that Rice immediately reported his version of these events to Gilbert.

In another oddity regarding Rice, Gilbert testified that when Rice reported this event he claimed that "people" had harassed him in the restroom. (Tr. 792.) Gilbert asked for the names of these individuals. According to Gilbert, at that point Rice changed his account, indicating that there was just one person involved. He refused to provide the name of this employee. Gilbert reported Rice's remarks to higher management. Adams testified that she learned that, "Randy had been corner[ed] in the bathroom, that he had been harassed and threatened by coworkers." (Tr. 1029.) She conveyed this to Landriscina who ordered an investigation and the termination of those involved. Wales was placed in charge of this investigation.

At this point in the chronicle of events, Rice and Gilbert claim that Wales participated in a meeting with them to discuss the issue of harassment. Wales denies that this took place, contending that his only interview of Rice about the issue happened much later. Wales testified that this meeting occurred on September 4, and was occasioned by the need to belatedly document the harassment issue as a justification for the discharges. I find that the documentary evidence convincingly supports Wales.

In a lengthy e-mail written in May, Wales provided Stowell with a detailed account of his investigation thus far. The primary focus of the investigation had been to obtain from Rice the names of the individuals alleged to have harassed him. Interestingly, the email reflects that Rice was continuing to contend that there were multiple harassers. As Wales described it,

> Randy Rice said he was confronted in the restroom by 3-4 individuals that called him foul names and basically harassed him.

(GC Exh. 19, p. 1.) Wales went on to note that Gilbert "has been working since last week to get the names from Randy.

[37] In her testimony, Adams conceded that, standing alone, this remark was not "an incident that would have been worthy of termination." (Tr. 1069.)

[38] Gilbert testified that in April 2003 he warned Schantz against falsely accusing Rice of work errors. Gilbert testified that Schantz admitted that he had done this "to stir up trouble between the . . . machinists and Randy Rice." (Tr. 789.) I find this account of Schantz's purported full confession to spreading slanderous statements against Rice to be highly unlikely. It fits a pattern of incredible statements peppered throughout Gilbert's testimony regarding Shapley and Schantz.

[39] Rice claimed that, in October 2002, Kevin Schantz called him a "suck ass" and told him that "you've got your head so far up the company's ass you can't breathe." (Tr. 696.)

Dan put together a list of individuals that he thought might be involved and asked Randy to confirm the names, which he did." (GC Exh. 19, p. 1.) Wales' written account was supported by testimony from Stowell, who reported that,

> sometime in that period [after the May 7 incident] Steve [Wales] reported that Dan [Gilbert] had talked to Rice and . . . that Randy had indicated through some agreement of some sort who was involved.

(Tr. 461.) Beyond this, Wales' version is even corroborated by Gilbert himself, in an affidavit that he provided on October 6, 2003. In that account, he states that "after I wrote down several names [Rice] indicated whom the individuals were by nodding (for yes) and shaking his head (for no)," (GC Exh. 51, p 2.) According to the same affidavit, It was only after eliciting this information from Rice that Gilbert reported the incident to Stowell and Wales. From all this, it is clear that Wales was not a participant in the May interview of Rice by Gilbert.

In this e-mail to Stowell, Wales reported that Rice claimed that four individuals harassed him in the bathroom, Shapley, Shane Howard, Dave Main, and Greg Cole. In addition, Rice asserted that Schantz was not in the bathroom but had "made some calls to individuals to instigate the harassment."[40] (GC Exh. 19, p. 1.) The letter does not indicate how Rice claimed to have knowledge about Schantz' supposed phone calls.

Interestingly, Wales used this e-mail to ponder the issues presented. Despite noting that he had a "gut" feeling that Gilbert and Rice were sincere, he also raised the following questions,

> is it possible that some things might have, or could have, occurred prior to [the formation of the Company] that would cause Randy and Dan to fabricate something like this so the company can substantiate getting rid of them? Just a question that I want you to think about . . . .
> Do we believe what Randy is claiming and take action, or should I gather more evidence or facts?

(GC Exh. 19, p. 1—2.)

In this correspondence, Wales also grappled with the effects of any management action on the Company's production process and its commitments to customers. He warned that if they decided to fire these employees, "we need a transition plan [due] to the impact that getting rid of them all at once would cause." (GC Exh. 19, p. 2.) He suggested that the process of obtaining requisitions for new hires be undertaken, noting that if terminations were not made the requisitions would not have to be used. He asked Stowell a final question, "Do you want me to get with Carol [Rogers] to have her initiate these [hiring requisitions]?" (GC Exh. 19, p. 2.)

At the end of the week during which Rice raised his allegations of harassment, Wales prepared his customary weekly update report. He noted that he had, "[i]nvestigated harassment of a machinist in the factory. 3-4 employees involved. Still gathering information." (R. Exh. 4, p. 2.) In apparent follow-up of his e-mail to Stowell, Wales also noted that in the following week he would

> [s]ubmit employment requisitions to replace 3-4 employees that were involved in the harassment of another machinist. Positions only to be filled with the understanding that terminations will occur in the future. Need to discuss timing for training, etc.

(R. Exh. 4, p. 2.)

At the end of the next week, Wales returned to this issue in his weekly update report. He reported that his investigation continued and that they had learned the names of those believed to be at fault. Under the heading of "Next Weeks Actions," he stated that he would select persons to be interviewed as replacements for terminated employees, but cautioned that, "[p]ositions only to be filled with the understanding that terminations will occur in the future. Need to discuss timing for training, etc." (R. Exh. 5, p. 2.) In addition, he raised a new aspect of this issue, indicating that he planned to assure that the supervisor of the machinists, Archie Howard, would "take responsibility for terminating the 5 employees responsible for the harassment." (R. Exh. 5, p. 2.)

In the next weekly report prepared at the conclusion of the week beginning on May 19, Wales again noted that "5 employees [were] involved" in the harassment and that a "[p]lan for finding replacements will be proceeding next week including interviews and selection." (R. Exh. 6, p. 1.) In the section of the report regarding actions for the following week, he again noted that the positions would only be filled in the event "that terminations will occur in the immediate future." (R. 6, p. 2.) He also returned to two other themes articulated in his prior reports, that the timing of new employee training would need to be discussed, and that Howard would have to take responsibility for the firing of the employees and the training of their replacements.

Just 1 or 2 workdays after Wales' weekly report described above, Shapley and Schantz were discharged. Within hours of the discharges, Stowell e-mailed Wales, directing him to "[d]ocument the file with the reasons of poor quality and harassment of a fellow employee." (GC Exh. 12.) As previously discussed, Wales dragged his feet, failing to complete this assignment throughout the summer months. In early September, he was specifically ordered to interview Rice about the harassment issue. A list of written questions was drafted. Gillesse approved the list and Wales and Gilbert met with Rice on September 4 to obtain the answers to the questions.

Although the documentary evidence clearly shows that Rice was interviewed by Gilbert and Wales on September 4, both Gilbert and Rice testified in an incorrect and evasive manner regarding this event. Under examination by counsel for the General Counsel, Rice unhesitatingly confirmed the meeting. Shortly thereafter, when examined by counsel for the Company, he just as unhesitatingly denied the existence of the same meeting. On the other hand, Gilbert simply took the position that he could not recall whether there had been such a meeting on September 4.

I readily conclude that the meeting occurred and was fully documented by Wales in a written report wherein each of the

[40] It is certain that Schantz was not in the restroom since he was not at work on that day.

questions and Rice's answers were recorded in detail. One of the first questions concerned the number of people who confronted Rice in the bathroom on May 7. In a further indication of Rice's inability to recount a consistent version of those events, Rice responded that he did not recall how many persons were involved. Rice was then asked whether any among a list of several employees had ever threatened him. He reported that Shane Howard, Mike Shapley, and Greg Cole had made such threats to him. He further reported that Dave Main and Duane Schantz had not threatened him.

What is one to make of all this? On examination of the evidence with particular emphasis on the documents, several things become clear. First, there is no doubt that the Company received an allegation from Rice that he had been harassed. It was necessary and proper for management to respond to this situation. An appropriate investigation was initiated. The evidence acquired was very thin. Rice could not maintain a consistent account of how many people harassed him. At various times he alleged that his harassers included Shapley, Schantz, Howard, Cole, and Main. Despite the fact that corroboration was minimal to nonexistent, the Company did not interview any of the alleged harassers.[41] Although it was recognized that the possibility existed that Rice and Gilbert were fabricating the allegations in order to rid themselves of employees they did not like, thought continued to be given to termination of the accused harassers.

As I have indicated, I find that the Company was giving genuine consideration to discharging the persons named by Rice as harassers, including Shapley and Schantz. However, this is only part of the story as revealed in the contemporaneous documentation. It is very clear from that documentary evidence that this consideration was extended to the employees as a group. The documents always refer to four-to-five employees subject to discharge. In addition, the documents demonstrate a consistent concern that the discharges be made as part of an orderly transition process so as to protect productivity and meet commitments to customers. This attitude was consistent with the Company's past performance as illustrated by the staggering of the 3-day suspensions imposed as part of the performance improvement process in the preceding month. The documents reflect that the completion of the hiring requisition process, the selection of new hires, the training of those selected, and the preparations for the termination process by Supervisor Howard were all vital preconditions to the discharges.

All of this stands in stark contrast to what actually occurred on May 28. First of all, only two alleged harassers were discharged. The Company did not present any rationale to explain why these particular men would have been selected for discharge. While Rice did consistently maintain that Shapley had harassed him on May 7, it was obvious that the same could not have been true for Schantz. It will be recalled that on that date, Schantz was not at work. Furthermore, when Rice was interviewed about the harassers in September, his responses expose the lack of rationale for the selection of Shapley and Schantz. As befits the evidence, Rice expressly denied that Schantz had threatened him. On the other hand, he asserted that both Cole and Howard had threatened him. There is simply no evidence to explain why the Company altered its clearly articulated plan to fire all the accused harassers. Nor is there any evidence, apart from participation in protected activities, to explain why Shapley and Schantz were the chosen subjects of termination.

Perhaps even more significantly, the evidence shows that the Company's careful planning process was abandoned on May 28. In a key exchange, counsel for the General Counsel explored this with Adams,

> COUNSEL: Shapley and Schantz. You didn't replace them right away, did you?
>
> ADAMS: I don't recall we had candidates ready necessarily to replace them, no.

(Tr. 1083.) Yet, this was a key precondition discussed in every document relating to the harassment problem.

Based on the evidence, I readily conclude that if the men had been discharged for harassing Rice, they would have been fired by Howard and accompanied out the door by their fellow alleged harassers. Beyond that, entering the door while they departed would have been their replacements, replacements that had been preauthorized, preselected, and perhaps even pretrained. The absence of these things sheds a harsh and revealing light upon the Company's actual motive.

In sum, I find that the Company has failed to meet its burden of demonstrating that it would have discharged Shapley and Schantz regardless of their protected activities. The contention that they were discharged in whole or part for poor work performance is simply a pretext so illogical as to be readily discarded. The contention that they were discharged, either in whole or part, for harassing Randy Rice has the outer trappings of substance. It is indeed possible that the two men would have been discharged for this at some future date. However, such a scenario would have involved discharge of other employees as well and would have been accompanied by the prudent steps repeatedly outlined in the documents as being vital to the protection of the Company's business interests. Therefore, while the Company may conceivably have had grounds to discharge Shapley and Schantz for harassment, the fact remains that it did not actually discharge them for this reason.[42] Based on all of

[41] In itself, this is evidence of animus. As the Board has noted, "[a]n employer's failure to permit an employee to defend himself before imposing discipline supports an inference that the employer's motive was unlawful." [Citations omitted.] *Embassy Vacation Resorts*, 340 NLRB No. 94, slip op. at p. 4 (2003). See also, *Hospital Espanol Auxilio Mutuo de Puerto Rico, Inc.*, 342 NLRB No. 40, slip op. at 3 (2004) (animus shown when employer accepted complaints as true without affording employee an opportunity to rebut them) and *Rood Trucking Co., Inc.*, 342 NLRB No. 88 (2004), slip op. at p. 6, (failure to confront employee with surveillance report prior to discharging him was action "indicative of a discriminatory intent").

[42] The importance of this point of law is amusingly illustrated in the case of *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3rd Cir. 1943), cert. denied 321 U.S. 778 (1944). In upholding the Board's conclusion that an employee, one Weigand, had been fired for union activity, the Circuit Court noted that, "[i]f ever a workman deserved summary discharge it was he." 138 F.2d at 90. Weigand had attended work while intoxicated, came and went as he pleased, readily admitted that he did not know anything about his job, and brought a woman into the plant for unspecified dubious purposes. Despite all this, his behav-

the credible evidence, I find that that actual motive was the unlawful reason alleged by the General Counsel and described with precision in the testimony of Wales.

C. The Incidents Involving Moran

The Company and its predecessors have employed Moran since 1995. Hehas served as a maintenance electrician since 2000. Heatherington is his team leader and Gilbert is the supervisor of the maintenance staff. The General Counsel alleges that the Company took action against Moran on four separate occasions. He further contends that on each occasion, the motive for such action was retaliation against Moran for participation in these proceedings. If established, such conduct would violate Section 8(a)(1) and (4) of the Act.

Section 8(a)(4) prohibits discrimination against an employee "because he has filed charges or given testimony under this Act." The Board interprets this Section liberally in recognition of the congressional intent to encourage workers to feel free to report perceived violations of the Act to the Board. *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001), and the cases cited therein. Alleged violations are assessed using the *Wright Line* methodology. *McKesson Drug Co.,* 337 NLRB 935, 936 (2002). Using this form of analysis, I will now examine each of the four employer actions against Moran alleged to be unlawful.

The General Counsel's first allegation is that on January 13, 2004, Gilbert "verbally harassed . . . Moran because he gave testimony under the Act" in violation of Section 8(a)(1) of the Act.[43] (GC Exh. 1(n), p. 3.) At the first step, the evidence is clear that Moran's situation at that time involved protected conduct. On December 30, 2003, counsel for the General Counsel had issued a subpoena commanding Moran's attendance on January 13, 2004, in order to take his testimony regarding the unfair labor practice charges arising from the discharges of Shapley and Schantz. (GC Exh. 6.) Moran testified that he received this subpoena on January 6. Having been subpoenaed in this manner, Moran was entitled to protection under the Act. *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972) ("Once an employee has been subpoenaed he should be protected from retaliatory action regardless of whether he has filed a charge or has actually testified.")

The evidence also reveals that the Company was fully aware of Moran's involvement in the upcoming trial. I credit Moran's testimony that Gilbert raised the trial in a conversation with him on January 5. During that conversation, Moran stated his belief that Shapley and Schantz had been discharged for union activities. On the following day, Moran was asked to attend a meeting with management officials and the Company's former attorney. The purpose of the meeting was to discuss the Board proceedings. During the meeting, Moran informed the participants that Gilbert had approached him on May 28 in order to interrogate him regarding union activities. Finally, in preparation for his attendance at trial on January 13, Moran submitted a vacation request form for that date.[44] Gilbert testified that he was aware that Moran had been subpoenaed. From all this, I have no difficulty in finding that the Company was aware of Moran's status as a prospective witness under subpoena by the General Counsel.

At the next steps of the analysis, I must determine whether Moran was subject to adverse employment action (i.e. harassment by his supervisor), and whether such adverse action was substantially motivated by animus against him due to his anticipated participation in Board proceedings. Moran testified that he did not attend any Board proceedings on January 13 since the trial date had been postponed.[45] As a result, he reported for work at his normal time. Early in his shift, he was examining a machine operated by Hutchings. He testified that Gilbert called him on the radio and instructed him to stop speaking with Hutchings, noting that, "this behavior will not be tolerated." (Tr. 119.) Afterward, Moran went to see Gilbert to discuss the incident. He testified that Gilbert told him that he did not want Moran "get mixed up in" the Board's proceedings. (Tr. 120.)

Moran's account is strongly corroborated by Heatherington's testimony.[46] Indeed, his testimony sheds additional light on the nexus between Gilbert's chastisement of Moran and Moran's participation in the Board's proceedings. Heathington explained that he overheard Gilbert speaking to Moran by radio. Gilbert taunted Moran, noting that he thought Moran was going to be on vacation that day. Moran explained that he had submitted a vacation slip, but now wanted it to be cancelled. Heatherington testified that Gilbert responded,

> What happened? You can't make up your mind whether you want to come to work or want to be on vacation?

(Tr. 197.) Heatherington was so appalled by what he had overheard that he confronted Gilbert later that day, telling him that his treatment of Moran had been sarcastic and inappropriate.

I find that Moran was subjected to verbal harassment by his supervisor on January 13, conduct that was so far beyond the ordinary that it provoked a rebuke from Heatherington. I further conclude that the motivation for the verbal abuse was Moran's anticipated participation in the upcoming trial. It is particularly logical to draw this connection with respect to Gilbert since Gilbert was aware that Moran intended to provide testimony that would directly undermine his own account of the key events leading to the discharges of Shapley and Schantz.

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ior had been tolerated for a long time, until he began organizing activity. Shortly thereafter, he was fired. The Court affirmed the Board's order requiring his reinstatement.

[43] Although the complaint links the harassment to Moran's status as a witness, a violation of Section 8(a)(4) is not alleged as to this episode. The Board has held that harassment in retaliation for participation in Board proceedings violates Section 8(a)(4). See: FiveCAP, Inc., 332 NLRB 943 (2000), enf. 294 F. 3d 768 (6th Cir. 2002), and NLRB v. S.E. Nichols, Inc., 862 F.2d 952, 960—961 (2d Cir. 1988), cert. denied 490 U.S. 1108 (1989). Since any remedy would be cumulative, I will not further address this question.

[44] Gilbert made reference to this leave request form during his conversation with Moran on January 13, the conversation that is the subject of this analysis.

[45] On January 9, the Regional Director issued an order postponing the trial until April 19. (GC Exh. 1(h).)

[46] Hutchings also provided support for Moran's account, noting that he heard Gilbert come on the radio and complain about Moran's excessive standing around and talking.

At the final step of the assessment, counsel for the Company notes that the evidence shows that Gilbert was often "sarcastic and abrasive" to employees. (R. Br. at p. 31.) He suggests that there was no evidence to suggest that his similar treatment of Moran on that day was "because of his expected NLRB testimony." (R. Br. at p. 31.) I disagree. There is a clear connection established by Gilbert's pointed reference to Moran's cancellation of his leave request, a situation that was necessitated by the postponement of the trial. That connection was then underscored by Gilbert's direction to Moran to avoid becoming "mixed up" in the Board proceedings. (Tr. 120.) The Company has failed to establish that there was any legitimate reason for Gilbert to make these sarcastic remarks to Moran. All of the evidence indicates that the sole rationale for Gilbert's commentary was animus against Moran arising from his expected testimony, testimony that Gilbert knew would undermine his own position in the case. I conclude that the General Counsel has met his burden of demonstrating that Gilbert's conduct on this occasion violated the Act.

It is next alleged that the Company acted unlawfully when it issued Moran a 3-day suspension on February 13, 2004. Once again, analysis begins by noting Moran's status as a witness expected to testimony at the rescheduled Board proceedings. Beyond this, Moran was no longer merely a witness. On January 21, he had filed an unfair labor practice charge against his employer, alleging that he had been harassed by Gilbert as just described. (GC Exh. 1(j).) Moran's status as both a witness and a charging party brought him within the Act's protection.

On January 21, the Regional Director served a copy of Moran's charge on the Company. (GC Exh. 1(k).) This, coupled with the previously recounted evidence of knowledge of Moran's status as a witness, establishes that the General Counsel has satisfied the second of his evidentiary burdens. In addition, there can be no doubt that the issuance of a 3-day suspension to Moran constituted an adverse employment action.

Turning to the issue of employer motivation, it is important to note that Gilbert was the management official who issued the corrective action report. The record is replete with evidence of Gilbert's generalized animus against union organizing activity, particularized animus against Moran arising from Moran's involvement in Board proceedings, and willingness to engage in unlawful activity arising from his animus, including recommending the discharge of employees due to their organizing activity.[47] Therefore, I conclude that the General Counsel has established that unlawful animus formed a motivating factor for Gilbert's conduct in issuing the suspension to Moran.

I must now examine the Company's defense to this charge. In order to do so, it is necessary to recall the background. In late January 2004, Moran was assigned to the Accuride project. The workforce was under acute pressure to complete this job expeditiously in order to meet commitments made to the customer. Despite this, considerable evidence demonstrates that Moran's conduct on this job was characterized by instances of misconduct and poor productivity. Gilbert testified that, based on his experience with this sort of work, Moran took excessively long to complete his assigned tasks. He reported that other employees assigned to the project, "were giving me slack about how long I was gonna tolerate the inappropriate timeframe it took for Larry [Moran] to do his part of the work." (Tr. 816.)

Throughout this decision, I have expressed grave reservations about the credibility of Gilbert's account of events related to union organizing and the Board's proceedings. However, I conclude that the situation is different here.[48] When describing his normal supervisory functions and his relationship with Moran as regards the work processes, Gilbert struck me as far more persuasive. He demonstrated a clear and confident mastery of his supervisory role in overseeing the flow of the company's production process. Having said this, I nevertheless have approached his testimony with a healthy degree of skepticism. Ultimately, I am impressed and convinced by the corroborating evidence presented by the Company on the issue of Moran's work performance.

To begin with, I place weight on the overall assessment of Heatherington, a witness whose opinions were characterized by fearless objectivity. As Moran's coworker and team leader, he was in a position to fully evaluate Moran's work ethic and habits. It was clear that he found Moran to be less than satisfactory, noting that he lacked the requisite "enthusiasm and zeal" for his work.[49] (Tr. 662.) More important than Heatherington's overall opinion, Moran's fellow employees testified in support of Gilbert's assertions regarding Moran's poor performance on the Accuride project. Scott Binkowski was also assigned to the Accuride work. He testified that he became frustrated with Moran's practice of being unavailable when problems arose. His unhappiness with his coworker culminated in a decision to tell Gilbert that, "it would be nice if Larry could stick around every once in a while." (Tr. 542.)

By the same token, Dave Boomer testified as to his dissatisfaction with Moran's work on the Accuride presses. Interestingly, Boomer and Moran were assigned to perform an identical chore, wiring of two so-called pigtails. Boomer testified that he completed his assignment by 1 p.m. Moran did not finish the job until the following day. As a result, Boomer asked Gilbert "if Larry could be transferred back to maintenance and I would just do the job." (Tr. 757.)

With this context, I have examined the Company's asserted rationales for imposition of the 3-day suspension as set out in the corrective action report. The general reason for the suspension is described as "[o]verall low productivity." (GC Exh. 7, p. 1.) Four examples are listed. The first example concerns the pigtail job already discussed. It is asserted that Moran spent 1.5

[47] As will be discussed later, Gilbert was also willing to unlawfully interrogate and threaten employees in order to thwart their organizing efforts.

[48] The Board has often noted that it is routine for fact finders in these proceedings to credit some, but not all, of a witness' testimony. See: *Daikichi Sushi*, 335 NLRB 622 (2001), and *Amber Foods, Inc.*, 338 NLRB 712–715 fn. 13, both citing Judge Learned Hand's observations in *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951).

[49] By contrast, I note that Heatherington testified that Shapley and Schantz were "very competent, skillful workers." (Tr. 192.) Again, this illustrates Heatherington's willingness to give forthright assessments regardless of who may be pleased or angered by them.

days on the job versus an expected period of 4 hours. This mirrors Boomer's testimony.

The second specific allegation was that Moran left his workstation prior to the end of his shift on January 30. Moran testified that, "according to the Rule Book" employees are not permitted to leave their workstations until 3:25 if the shift ends at 3:30. (Tr. 162.) He also testified that on January 30, he left his workstation at 3:20. Gilbert testified that he observed that Moran was not present at his workstation as of 3:15, and that his toolbox was locked up. He noted that he asked Moran's coworkers about his whereabouts and they "all just kind of laughed and looked at his [tool]box, it was kind of obvious that . . . he was closed up and done for the day." (Tr. 817—818.)

The third reported example of Moran's deficient productivity referred to an incident on February 6 during which it was contended that Moran ignored Gilbert's instructions and made errors in the wiring of one of the Accuride presses. Without delving into all the technical details, suffice it to say that Gilbert testified that he told Moran to wait for necessary parts. By contrast, Moran testified that Gilbert authorized him to complete the job in a manner that would not require those parts. While the conflicting testimony as to this situation was somewhat of a standoff, on balance, I credit Gilbert since his overall appraisal of Moran's job performance was corroborated by the testimony of Heatherington, Binkowski, and Boomer.

The final example involved an issue unrelated to the Accuride project. Moran was criticized for spending unnecessary time reviewing the operation of a machine customarily operated by Vern Hayes. In defense against this allegation, Moran explained that he was not wasting time, but was rather investing the effort needed to "learn about the machine." (Tr. 134.) Gilbert testified that he had previously warned Moran "on numerous occasions" for simply "staring" at this machine. (Tr. 822.) He contended that Moran should have formulated a plan designed to improve the machine's performance. As he put it, "its just the unnecessary standing there looking in the panel without ever having a plan." (Tr. 823.) Once again, I credit Gilbert regarding this episode. I note that the situation differs from the earlier incident involving Hutching's machine. In that instance, I found Gilbert's remarks to be unlawful harassment because Gilbert linked his comments directly to the Board's proceedings. Thus, I found the primary thrust of his criticism to be directed at discouragement of Moran's protected activities. By contrast, there is nothing here to indicate a similar improper motive. Instead, Gilbert's dissatisfaction with Moran's work performance is part of a pattern of similar problems noted by Gilbert, Heatherington, Binkowski, and Boomer. Furthermore, the citation of this situation as one of a group of productivity problems was primarily designed to form part of a written performance improvement plan, a legitimate supervisory effort.

In addition to finding that the Company's rationale for disciplining Moran had substance, I note that the discipline was imposed in a manner entirely consistent with past practice. The evidence regarding that past practice shows that four employees had previously been subject to discipline for poor productivity. Those suspensions were imposed in April and May 2003. There is no contention that they were in any way influenced by unlawful animus. Because they concerned Shapley, Schantz, Jensen, and Hayes, the details have already been thoroughly discussed. Those suspensions involved the use of the same type of disciplinary form with its references to an overall complaint and specific examples. Even more significantly, each of those instances of discipline involved the imposition of the identical sanction to that assessed against Moran. The consistent nature of the Company's efforts to respond to productivity issues is probative evidence in support of the regularity of its treatment of Moran.

The Board's *Wright Line* formulation embodies a mature recognition of the complexities of human thought and behavior. Important supervisory decisions can often involve a poorly differentiated set of factors, including entirely logical and appropriate thoughts combined with base and unworthy emotions. Moran's suspension involved just such an aggregate of factors. I find that in untangling the strands of Gilbert's decision making, the rational predominated. In other words, the determinative motivator for the issuance of the suspension was legitimate and appropriate concern about Moran's poor work ethic and productivity, particularly as it related to an important Company work project. I am persuaded that Moran would have been suspended regardless of his involvement in protected activities. As a consequence, the Company has shown that its decision to suspend Moran was not unlawful.[50]

Less than 2 weeks after he was suspended, Moran was again subject to disciplinary action. On February 24, he was issued a second corrective action report, citing him for two violations of the Company's leave and attendance policies. Unlike the prior corrective action report, this one did not impose any sanction beyond the written warning.

Turning to the analysis of this alleged violation of the Act, I have already noted that Moran's status as a charging party and subpoenaed witness for the upcoming trial placed him under the Act's protection. In addition, the evidence demonstrates that the Company was aware of his status. Furthermore, there can be no doubt that the written warning was an adverse action, particularly as it noted that further violations of leave and attendance policies "will result in disciplinary action up to and including termination." (GC Exh. 8.)

Regarding the Company's motivation in imposing this written warning, I conclude that animus against Moran's upcoming participation in Board proceedings was involved. I reach this conclusion for the same reasons as discussed with reference to the prior alleged acts of retaliation against him.

Having made these findings, the focus returns to the issue of whether the Company has met its burden of showing that it would have issued the written warning to Moran regardless of his involvement in the Board proceedings. Once again, I conclude that it has met this burden.

[50] As the Board noted in a similar case involving an employee named Doll, "even if Doll's union activity were a reason for her discharge, the Respondent met its burden under *Wright Line*, 251 NLRB 1083 (1980), and demonstrated it would have discharged Doll in the absence of such protected activity." *Arlington Hotel Co., Inc.*, 278 NLRB 26 (1986).

The events under discussion began on February 19. Moran testified that Gilbert was not present at the plant on this date.[51] Having decided to take a half-day of vacation time on the following day, Moran placed a request for vacation time on Gilbert's desk. In Heatherington's presence, he made an ostentatious show of placing the document on the desk. I conclude that he did this because he knew that he was playing fast and loose with the Company's vacation policy.

On the following day, Moran was present at work during the morning. Gilbert saw him at that time. Moran reported that he did not see Gilbert and noted that, "I made no attempt to." (Tr. 139.) After working a half-day, Moran departed. That afternoon, Gilbert searched for Moran. Upon being unable to locate him, he questioned Heatherington who told him about the vacation request slip. Gilbert testified that he located the slip "tucked into paperwork on the daily logs" on his desk. (Tr. 826.) He signed and dated the slip, indicating his approval. He did so because he recognized that, "it was done and over with, you know. I just figured I'd talk to Larry come Monday." (Tr. 829.) In particular, Gilbert was concerned that Moran had submitted the request for leave but had not bothered to learn if it had been approved before departing the plant.

Gilbert's plan to speak to Moran on the next workday, Monday, February 23, was thwarted by Moran's decision to take that day off. Moran testified that he had injured his foot over the weekend and decided not to report for work that Monday. He telephoned Heatherington and told him that he would not be coming in. He asked Heatherington "to relay the message to Dan." (Tr. 136.) Heatherington did so.

On the following day, February 24, Moran was issued the written warning arising from the incidents on the two preceding workdays. That notice asserts that Moran's conduct was in violation of the Company's employee handbook. Examination of the handbook supports the Company's position. It authorizes employees to take vacation time in half-day increments as Moran desired. However, it provides that "[v]acation time must be scheduled with the employee's supervisor." (R. Exh. 7, p. 18.) By the same token, the handbook acknowledges that there will be times that an employee is unable to report for a scheduled shift. In such a case, it directs that employees "must notify their immediate supervisor before the beginning of their scheduled reporting time." (R. Exh. 7, p. 13.)

I conclude that Moran did, in fact, violate the cited provisions of the handbook. He failed to make reasonable efforts to obtain his supervisor's approval before taking a half-day of vacation on February 19. He could have easily raised the issue with Howard, his acting supervisor. Failing in this, he still had ample opportunity to speak to Gilbert on the morning of the 19th. His decision to leave without determining whether his vacation request had been approved was a violation of Company policy.

Regarding Moran's manner of calling in sick, I reach a similar conclusion. Moran did not testify that he made any effort to speak with Gilbert on the morning of February 23. His decision to speak with Heatherington was not an acceptable substitute. At that time, Heatherington had not yet been appointed as team leader and had no supervisory authority. There is simply no explanation as to why Moran failed to contact Gilbert directly. Boomer testified that when an employee calls in sick, he dials the Company's main telephone number. This connects the caller to a voice mail system that enables the caller to select the extension and message box for the intended recipient. Moran never explained why he failed to use this system to speak with Gilbert or at least leave a message for him. I am persuaded that Moran's actions on this date were designed to avoid the possibility that he would have to discuss his leave status with Gilbert. He selected Heatherington's extension instead, thereby ensuring that he would present Gilbert with a fait accompli. This violated the Company's policy.[52] The fact that Moran's warning was based on his violations of preexisting written policies lends credence to the Company's disciplinary action.

Counsel for the General Counsel asserts that the issuance of the warning to Moran constituted disparate treatment since other violations of the attendance policies had been tolerated. The evidence does show that some violations, including prior violations by Moran, had been excused. As Gilbert put it in a slightly different context, "you have to let things, some things, go." (Tr. 912.) Nevertheless, the decision not to let these instances of Moran's behavior go was not evidence of disparate treatment and animus. Gilbert testified that he did intend to let Moran's first violation on February 19 pass with a simple verbal discussion on the next workday. Unfortunately, on that day, Moran chose to again violate the leave and attendance rules. And, all of this followed on the heels of Moran's suspension, a sanction that was imposed in part due to Moran's unauthorized early termination of his shift, a similar type of infraction. I conclude that Moran's conduct was repeated and flagrant. It was of a different degree altogether from the occasional infractions of the leave and attendance policies that were previously tolerated by management. As Gillesse put it,

> it seemed like there was more of this starting to happen. It was these types of things were becoming more frequently . . . . We wanted to make sure that, again, we got his attention and let him know that what was happening was not satisfactory.

(Tr. 964—965.)

I find that the Company has met its burden of establishing that it imposed this sanction on Moran for legitimate reasons. Moran's repeated misconduct justified the Company's concern. The discipline was imposed for violation of preexisting written policies. Additionally, it consisted of a carefully calibrated sanction, the written warning. I note that had the Company been primarily motivated by animus, it could have chosen a far more severe punishment and justified its choice by asserting that it was a progressive disciplinary step following the prior 3-day suspension. The fact that it did not adopt this course is additional evidence that its predominant motives were genuine

[51] The fact that Gilbert was not available does not excuse Moran's subsequent conduct. In his testimony, he admitted that he knew that in Gilbert's absence, his supervisor would be Howard. He made no effort to seek approval of his vacation request from his acting supervisor.

[52] In an exchange that is too lengthy to quote here, Moran admitted as much. (Tr. 171—172.)

and proper. As a result of these considerations, I conclude that the Company would have issued Moran a written warning for leave and attendance violations regardless of his participation in protected activities.

The General Counsel alleges an additional instance of retaliation against Moran, the decision to deprive him of the opportunity to work on Saturday, June 5. Following the analytical steps, I first note that by this time Moran's involvement in protected activities was far larger. He was no longer merely a prospective witness in the upcoming trial. On June 2, Moran actually appeared as a witness, giving testimony that was significantly adverse to the Company's interests. In addition, he played an active role as a charging party, sitting at counsel table throughout the proceedings and assisting counsel for the General Counsel. Adams, who was present throughout in a similar role assisting counsel for the Company, witnessed his testimony and activities. On the day following the conclusion of the first week of this trial, Moran was denied the opportunity to work an extra shift. For reasons shortly to be discussed, I find that he had been previously assigned to work this shift. His abrupt removal from it was an adverse action that deprived him of the opportunity to earn additional income. The Board has held that reduction in an employee's work hours or overtime made in retaliation for participation in Board proceedings violates the Act. *USA Polymer Corp.*, 328 NLRB 1242, 1243 (1999), enf. 272 F.3d (5th Cir. 2001), cert. denied 536 U.S. 939 (2002).

Before addressing the evidence regarding motivation, it is appropriate to summarize the events involved in the consideration of this charge. It is undisputed that the Company was experiencing a problem with one of its transformers. It was decided to remove the faulty equipment and reroute the power supply using the remaining transformers. Both testimony and documentary evidence clearly establish that Moran was a key participant in this endeavor. Throughout April, he worked on the early stages of the project and Company time records fully document his involvement. In addition, Moran sought and obtained management's approval for the hiring of a consultant to brief him on the technical requirements for the job. That consultant, Van Sweden, met with Moran and addressed correspondence related to the project directly to Moran. (GC Exhs. 33 and 34.)

Heatherington testified that management selected Moran as one of the employees who would remove the transformer on Saturday, June 5. His selection is entirely logical given the evidence showing that he had been playing a leading role on the project. It would defy logic to believe that the Company would fail to arrange for the employee who had obtained the technical consultation to be present during the work itself. Once again, documentary evidence lends further support to a finding that Moran was assigned to this extra shift. Gilbert prepared overtime request forms. (GC Exhs. 49 and 50.) Those forms show that Moran was to be involved in the Saturday work. They also contain crude alterations that demonstrate that a hasty decision was made to remove him from the rolls of those who would work the extra shift.

Moran was never informed that he had been removed from the Saturday project. Based on the testimony, I conclude that Gilbert assumed Heatherington would tell Moran. Similarly, Heatherington assumed that Gilbert would do so. In the event, neither assumption was correct. Moran reported for work that Saturday morning. He was advised that his services were not required and he departed. Interestingly, on the following Wednesday, Moran received a memorandum from Gillesse. In it, Gillesse advised Moran that he was being issued a check for 2 hours' pay because, "you reported to work on Saturday[,] June 5, 2004 but were excused shortly thereafter." (GC Exh. 32.) Gillesse went on to quote the handbook's provision:

> If you are asked to report to work on any day including Saturday, Sunday or a holiday and you do so at the specified time, you shall receive a minimum of (2) two hours pay at your regular rate if no work is available.

(R. Exh. 7, p. 17 as quoted in GC Exh. 32.) Gillesse's memorandum to Moran contains a clear concession that Moran had been scheduled to work on June 5, had reported as scheduled, and had not been permitted to work.

I find that the evidence compels a conclusion that the decision to deprive Moran of this work opportunity was purely motivated by unlawful animus. I have already noted the considerable evidence of such animus directed against Moran, including an act of verbal harassment that violated the Act. It will also be recalled that several months before this event, Gilbert engaged in a discussion with Heatherington during which he made reference to Moran's filing of a charge against the Company. At that time, he told Heatherington that, "Larry really needs to be gone." (Tr. 207.)

Beyond this background of generalized animus against Moran, the timing of the Company's action on June 5 is strong evidence of unlawful motivation. Moran spent the 3 days immediately preceding that date engaged in testifying against the Company and assisting counsel for the General Counsel in presenting the case against the Company. The close temporal relationship between Moran's highly visible role at trial and the deprivation of his assigned work opportunity is compelling evidence of unlawful motivation. Lastly, I conclude that the employer's asserted justification for Moran's removal from the Saturday schedule is purely pretextual. As such, it constitutes evidence of unlawful animus. *Palace Sports & Entertainment, Inc.*, 342 NLRB No. 53, slip op. 2 at fn. 9 (2004).

Under objective scrutiny, management's explanation of its rationale for the decision to deprive Moran of his chance to earn extra income on Saturday appears to border on the absurd. Gilbert expressed that rationale, explaining that Moran

> was pulled off this [Saturday shift] for—one main reason becausehe was gone the two days for court and he never even called in to even, to find out if he was gonna work or not. He was never scheduled to work. Why would he come in on a Saturday if he was not asked to come in and work.

(Tr. 858.) Of course, this makes no sense. If he had never been scheduled to work, there would have been no need to have him "pulled off" the assignment list. He most certainly was scheduled to work as demonstrated by Heatherington's testimony, the documentary evidence, and the logic involved in consideration of Moran's central role in the preparatory work for the project.

I also do not credit Gilbert's assertion that Moran failed to inform the Company of his whereabouts during the 3 days immediately preceding that Saturday. In the first place, Moran testified that he prepared and submitted a vacation request slip for the first day of trial, June 2. He further stated that on the mornings of June 3 and 4, he reported to the plant prior to the start of the trial proceedings and "told Archie Howard that I had to return to the courtroom." (Tr. 571.) This testimony was uncontroverted. The Company failed to call Howard as a witness and I infer that his testimony would not have supported Gilbert's account. In any event, in his testimony, Gilbert conceded that he "assumed" that Moran was attending the hearing on the dates in question. (Tr. 845.)

The ultimate reason for concluding that the Company's defense to this charge is pure pretext is the logic of the situation. I can appreciate an employer's concern that the workforce assigned to a critical Saturday project actually appear as scheduled so that the work can be completed. If Moran had been on a fishing trip in the Yukon and had failed to confirm his intention to be present on Saturday, it may well have been prudent to pull him off the roster. Far from being in a remote and exotic locale, Moran spend the 3 days immediately prior to the Saturday shift in the continuous presence of Adams, the Company's vice president. Had any genuine concern existed regarding his intentions for Saturday, it would have been virtually effortless for Adams to ask him to contact Gilbert or simply to verify his plans directly.

Based on the evidence, with particular emphasis on the factors of timing and pretext, I conclude that the General Counsel has met its burden of showing that Moran's removal from the Saturday schedule was motivated by unlawful animus. While it has been appropriate to carefully analyze the Company's asserted rationale for other actions taken against Moran, this is not necessary with respect to this charge. The Board has made it clear that in cases where the proffered reason for the employer's actions is found to be purely pretextual and that no legitimate reason exists, "there is no dual motive, only pretext." *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1126 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003). In such circumstances, the analysis is not carried through the final step. *Golden State Foods*, 340 NLRB No. 56, slip op. at p. 2 (2003). Because the Company has offered nothing beyond pretext, such is the case here.

To summarize, the General Counsel has charged the Company with taking four adverse actions against Moran that are alleged to violate the Act. I have concluded that the General Counsel has met his initial burden with respect to each charge. The evidence shows that Moran's conduct and situation were entitled to the Act's protection and that his employer was aware of his protected status and activities. I have also found that it subjected Moran to four adverse employment actions and that each action was, to one degree or another, motivated by unlawful animus. Upon careful individualized analysis of each action, I have ultimately concluded that Gilbert's harassment of Moran and removal of Moran from the Saturday schedule were primarily motivated by animus and would not have occurred but for such unlawful motivation. By contrast, the issuance of the 3-day suspension and subsequent written warning to Moran were both principally motivated by legitimate concern about Moran's deficient work ethic and performance. As a result, those disciplinary actions would have been undertaken regardless of Moran's involvement in these proceedings.

D. Other Allegations of Misconduct by Gilbert

The General Counsel alleges that Supervisor Gilbert engaged in additional forms of unlawful conduct: interrogating employees concerning their protected activities, informing employees that those activities were under surveillance by their employer, and issuing a threat of plant closure in the event the workforce chose union representation. This behavior is alleged to violate Section 8(a)(1) of the Act.

In evaluating the alleged interrogations, I am mindful that the Board has held that,

> it is well-established that interrogations of employees are not per se unlawful, but must be evaluated under the standard of "whether under all the circumstances the interrogation reasonably tended to restrain, coerce, or interfere with rights guaranteed by the Act." [Citing *Rossmore House*, 269 NLRB 1176, 1177 (1984).] In making that determination, the Board considers such factors as the background, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and whether or not the employee being questioned is an open and active union supporter. [Footnotes omitted.]

Norton Audubon Hospital, 338 NLRB 320–321 (2002). I will assess each of the alleged conversations by application of this standard.

As made clear in counsel for the General Counsel's brief, it is first contended that on the same day that Shapley began collecting the names and addresses of employees in furtherance of his union organizing plan, Gilbert improperly interrogated Moran. Moran testified that, shortly after noon, Gilbert asked to speak with him. He told Moran that he had heard that individuals were "trying to form a union" and were collecting names and addresses. (Tr. 111.) Moran indicated that he did not know anything about this. Gilbert persisted, adding, "I hear one of them is Dewey [Schantz]." (Tr. 111.) Moran again pleaded ignorance. As the conversation ended, Gilbert observed that "there's going to be some changes around here today." (Tr. 111.)

Gilbert denies any such conversation with Moran on May 28. For reasons I have already discussed in detail earlier in this decision, I reject Gilbert's denial. Moran's account is corroborated by Gilbert's own admission that he had focused his attention on Shapley and Schantz that morning, by Wales' testimony regarding Gilbert's later activities on that day, by Gilbert's pattern of unlawful behavior in violation of the Act, and by Moran's consistent account of this incident given to former counsel for the Company at a time when he had no apparent pecuniary or other interest in the litigation.

Having found Moran's account to be credible, it is evident that Gilbert's questioning crossed the Board's line of demarcation. Gilbert was Moran's direct supervisor. In addition, Gilbert had established a rather fearsome presence among the employees due to his tendency to resort to sarcasm and other forms of abrasive commentary in carrying out his supervisory

responsibilities. His manner of presenting himself to his subordinates forms part of the context under review. In addition, Moran was not an open union supporter. It was clear that Gilbert's objective during the conversation was to obtain information about the organizing activities, and particularly to obtain confirmation that Schantz was involved. Thus, the purpose of the questioning was to seek "information upon which to take action against individual employees," a prohibited purpose. *John W. Hancock, Jr., Inc.*, 337 NLRB 1223, 1224 (2002). Finally, Gilbert terminated the conversation with an ominous threatening remark that, taken in context, greatly heightened the coerciveness of his questioning. I conclude that Gilbert's interrogation of Moran on May 28 violated Section 8(a)(1) of the Act.

On Sunday, June 29, 2003, the Union held an organizing meeting. The General Counsel alleges that on the following Monday Gilbert unlawfully interrogated Jason Sayles, Doug Edinger, Larry Moran, and other unnamed employees. Sayles testified that Gilbert approached him early in the shift and asked him "what went on in the meeting on Sunday." (Tr. 238.) After Sayles declined to provide this information, Gilbert asserted that, "he heard that I was one of the big-wigs of the meeting." (Tr. 238.) Sayles denied this. Similarly, Moran reported that Gilbert stopped him that morning and asked if he went to the meeting. Gilbert asserted that he had heard that "a lot of employees went to this meeting." (Tr. 113.) Moran denied attending.

Edinger testified that, on the same morning, he became aware that Gilbert had been asking other employees about the union meeting. In an apparent effort to forestall similar questioning, Edinger went into Gilbert's office and told him that he had attended the meeting. Gilbert asked him who else had attended. The two men then proceeded to discuss the pros and cons of union representation. Gilbert's final comment to Edinger was that "Ben [Landriscina] will close the place . . . [i]f the union came in." (Tr. 272.)

As I have previously noted, Gilbert's testimony regarding his conduct on this date was disingenuous. After first claiming that he simply asked innocuous questions about how his employees' weekends had been, he was later forced to concede that he had actually asked about their Sundays. He further admitted that he intended this question to be directed toward the union meeting and that his employees took it to mean just that. Gilbert's concessions on the witness stand, coupled with the impressively consistent testimony from the three employees persuades me that the conversations took place as recounted by Sayles, Moran, and Edinger. In addition, I find that similar interrogations were directed at Tom Clemens, Dave Boomer, Greg Matthews, Scott Binkowski, and Gary Sherry. I base this conclusion on Gilbert's testimony that he spoke to those employees on that day, asking them about their "weekend." (Tr. 808.) From the evidence, I infer that the questions about the weekend were actually pointedly directed at the union meeting.

Once again, I conclude that Gilbert's questioning of numerous employees about the union meeting violated Section 8(a)(1) of the Act. He was the supervisor of these employees, a supervisor known to be sarcastic and abrasive in his approach. None of the men were open union supporters. Gilbert's questions were clearly designed to elicit specific information in order to identify the participants in the meeting and assess their level of involvement. As to Edinger, I recognize that he chose to initiate the discussion. He made this unusual choice due to the coercive impact on him caused by Gilbert's interrogations of his coworkers. Once Edinger gave Gilbert the opening, Gilbert improperly sought the names of other persons who had attended. Even more significantly, Gilbert coupled his questioning with a specific threat of dire consequences arising from organizing activity. As with the other interrogations, I find that Edinger was subjected to unlawful and coercive questioning.

Finally, the General Counsel alleges another unlawful interrogation of Moran by Gilbert. Approximately a week before the scheduled trial on the charges arising from the discharges of Shapley and Schantz, Gilbert approached Moran. Moran testified that Gilbert told him that,

> the Company wanted to know if anyone in the shop had information about the NLRB proceedings that were happening on the 13th. And he asked me a couple of questions about the union. He asked me if I had ever been threatened by him ["]if I joined a union, I would befired.["] And I told him no. He then asked me if I thought that the Company fired Mike and Dewey for their participation in the union. And I told him, yes, I did think so. And he asked me why.

(Tr. 115.) In response to Gilbert's last question, Moran reminded him of their conversation on May 28. Gilbert then asserted that Shapley and Schantz' union activities were not the only reason they were discharged. He began to initiate further questioning of Moran, but Moran declined to participate, reminding Gilbert that he was under subpoena.

In a position statement dated March 22, 2004, the Company largely admitted that such a conversation had taken place.[53] It conceded that Gilbert had approached Moran "to see if he felt threatened by him." (GC Exh. 56, p. 2.) It denied any questioning about union activities, asserting that "the conversation did not go beyond that initial inquiry." (GC Exh. 56, p. 2.) It is obvious that the source for this version of events was Gilbert. I reject his claim that the conversation was so confined. Given the history between the two men and the extent and nature of Gilbert's other misconduct, I credit Moran's version of this conversation.

Once again, considering all the circumstances, I find that the interrogation violated Section 8(a)(1). Gilbert's questions about the Board's proceedings and the status of the Union were coupled with his pointed admission that Shapley and Schantz had been fired, at least in part, for union activity. The pernicious impact of this manner of questioning is clear.

The General Counsel alleges that Gilbert made a specific threat to Edinger during their conversation on June 30. I credit Edinger's account of this discussion, including his testimony that Gilbert stated that Landriscina would close the plant if the employees chose to organize.

[53] The position statement puts the date as being in November or December, but it is clear that the reference is to the same conversation between the two men.

Gilbert's threat of plant closure is a statement of the type that the Board characterizes as a hallmark violation of Section 8(a)(1) of the Act. *High Point Construction Group*, 342 NLRB No. 36, slip op. at 3 (2004).

The General Counsel's last set of allegations against Gilbert also arise from statements that he made to employees on May 28 and June 30. It is alleged that these statements created an impression that the Company had placed the employees' protected activities under surveillance. The Board considers employer conduct that creates such an impression to be a violation of Section 8(a)(1) of the Act. The rationale for this rule is concern that employees should be shielded from fear that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000).

The Board has recently described the standard employed in assessing this type of violation:

> In order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance.

Heartshare Human Services of New York, Inc., 339 NLRB 842–843 (2003).

As to Gilbert's statements on May 28, the credible evidence shows that Gilbert told Moran that he had "heard" that some employees were trying to organize. He added that, "I hear that one of them is Dewey." (Tr. 111.) I agree with counsel for the General Counsel's contention that these statements mirror those found to violate the Act in *Sam's Club*, 342 NLRB No. 57 (2004). In that case, a supervisor was found to have created an impression of surveillance when he told an employee that he had heard he was circulating a petition about wages. The Board held that such a statement "leads reasonably to the conclusion that the Respondent has been monitoring [the employee's] activities." 342 NLRB No. 57, slip op. at p. 2. In drawing this conclusion, the Board noted that the employee had not circulated the petition openly and the supervisor did not reveal the manner in which he had learned the information about the employee's activities. By the same token, Schantz had not openly engaged in organizing activities and Gilbert did not tell Moran how he had come to learn about Schantz' conduct. The fact that Gilbert chose to tell Moran about another employee's activities does not alter the result. The reference to Gilbert's awareness of Schantz' protected activities conveyed a clear impression of improper employer surveillance. I conclude that Gilbert's statements violated Section 8(a)(1) of the Act.

On June 30, Gilbert accosted Sayles and interrogated him about the union meeting held on the previous day. Based on the credible testimony, I conclude that Gilbert told Sayles that, "he heard that I was one of the big-wigs of the meeting." (Tr. 238.) Once again, this created an unlawful impression of surveillance. As another administrative law judge put it in a case affirmed by the Board,

> [A supervisor's] comment that he thought [an employee] was one of the leaders of the Union activity was the type of comment, the effect of which is to create the impression, in the mind of an employee, that his employer had been engaged in surveillance of its employee's union organizing activities and, therefore, said comment was violative of Section 8(a)(1) of the Act.

Athens Disposal Co., 315 NLRB 87, 98 (1994). In this instance, Gilbert's interrogation of Sayles coupled with his description of what he had heard regarding the extent of Sayles' involvement in the meeting created an identical impression of surveillance in violation of the Act.

CONCLUSIONS OF LAW

1. By discharging its employees, Mike Shapley and Duane Schantz, because they participated in protected union activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

2. By threatening, verbally harassing, and interrogating its employees, and by creating an impression of surveillance of its employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

3. By depriving its employee, Larry Moran, of the opportunity to work an additional shiftdue to his participation in proceedings before the National Labor Relations Board, the Respondent has engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (4) of the Act.

4. The Respondent did not violate the Act in any other manner alleged in the amended consolidated complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged its employees, Mike Shapley and Duane Schantz, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having discriminatorily denied its employee, Larry Moran, the opportunity to work an additional shift on June 5, 2004, it must make him whole of any loss of earnings and other benefits, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[54]

[54] I note that the Company already reimbursed Moran for 2 hours pay for that shift by memorandum dated June 9, 2004. (GC Exh. 32.)

I shall also recommend that the Respondent be ordered to post an appropriate notice in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[55]

ORDER

The Respondent, Bliss Clearing Niagara, Inc., of Hastings, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against Mike Shapley, DuaneSchantz, or any other of its employees for supporting, engaging in activities on behalf of, or seeking assistance from the International Association of Machinists and Aerospace Workers, AFL—CIO, or any other union.

(b) Depriving Larry Moran or any other of its employees of work opportunitiesor otherwise discriminating against them for engaging in protected activities, including the filing of unfair labor practice charges or participation in proceedings before the National Labor Relations Board.

(c) Threatening, verbally harassing, interrogating, or creating an impression of surveillance of its employees because those employees participated in protected union activities or in proceedings before the National Labor Relations Board.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Mike Shapley and Duane Schantz full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Mike Shapley, Duane Schantz, and Larry Moran whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Mike Shapley and Duane Schantz and the unlawful deprivation of work opportunity for Larry Moran, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and deprivation of work opportunity will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Hastings

Michigan, copies of the attached notice marked "Appendix."[56] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2003.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 5, 2004

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against Mike Shapley, Duane Schantz, or any of our employees for supporting, engaging in activities on behalf of, or seeking assistance from the International Association of Machinists and Aerospace Workers, AFL—CIO, or any other union.

WE WILL NOT deprive Larry Moran or any of our employees of work opportunities because of their participation in protected activities, filing of unfair labor practice charges, or involvement in proceedings before the National Labor Relations Board.

[55] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[56] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT threaten, verbally harass, or interrogate any of our employees, or create an impression of surveillance among our employees, because of their participation in protected union activities or in proceedings before the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Federal labor law.

WE WILL, within 14 days from the date of this Order, offer Mike Shapley and Duane Schantz full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mike Shapley and Duane Schantz whole of any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL make Larry Moran whole for any loss of earnings and other benefits resulting from our decision to deprive him of a work opportunity, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Mike Shapley and Duane Schantz and the unlawful deprivation of work opportunity for Larry Moran, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and deprivation of work opportunity will not be used against them in any way.

BLISS CLEARING NIAGARA, INC.